

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOSEPH SMITH,

Defendant-Appellant.

UNPUBLISHED

January 22, 2009

No. 279499

Mecosta Circuit Court

LC No. 06-005930-FH

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant Michael Smith appeals as of right his jury conviction of third-degree fleeing or eluding a police officer.¹ The trial court sentenced Smith as a fourth habitual offender² to 45 months to 20 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

Smith's conviction arises from a police car chase on May 16, 2006, that began in Mecosta County and ended in Newaygo County. The principal issue at trial was whether Smith or another occupant, Jim Castillo, was the driver of the vehicle involved in the chase. Smith was originally charged with third-degree fleeing or eluding in Newaygo County. However, that case was dismissed with prejudice when one of the prosecution's witnesses failed to appear. The case here was then filed in Mecosta County, where Smith was again charged with third-degree fleeing or eluding. The parties stipulated to the admittance of a certified copy of Smith's previous conviction of fourth-degree fleeing or eluding for the sole purpose of satisfying one of the elements of the charged offense.

At trial, Jason Hall testified that he sold methamphetamine that he bought from Smith. On May 16, 2006, Hall was living at his mother's house when it was raided at approximately 9:00 a.m. The police discovered methamphetamine and paraphernalia. Detective Sergeant Joel Abendroth interviewed Hall during the raid, and during the interview, Hall received a call from

¹ MCL 257.602a(3).

² MCL 769.12.

Smith on a walkie-talkie type phone, so Detective Sergeant Abendroth was able to hear the entire conversation. Detective Abendroth stated that Hall told him that Smith was his source for methamphetamine and that Smith actually manufactured it.

In Hall's conversation with Smith, Smith indicated that he had all the ingredients to make methamphetamine except for anhydrous ammonia and that he needed gas money in order to get some. Hall offered to meet Smith and give him gas money. Smith stated that he would be in a burgundy car. Neither Hall nor Detective Abendroth could remember if Smith said he would be driving. The police left Hall's house to meet Smith in Hall's stead.

En route to meeting Smith, Trooper Robert Watson was in the lead car, which was unmarked. Trooper Scott Taylor, who was in a marked patrol car, followed directly behind him. They arrived in the area of 8 Mile Road and Elder Road in Mecosta County around 3:00 or 3:30 p.m. Trooper Watson testified that he saw a red Beretta heading west on 8 Mile Road as he was heading east just after he passed Elder Road. He observed two male occupants. The passenger had darker hair and wore glasses. He estimated that he saw the occupants for one to two seconds with the cars traveling at approximately 55 miles per hour. Trooper Watson was in the only car to pass by the red Beretta. Trooper Watson radioed Trooper Taylor about the red Beretta. After he passed by, he saw in his rearview mirror that the red Beretta had turned right onto Elder Road.

Trooper Taylor testified that when he received the call from Trooper Watson, he saw the car turn onto Elder Road without using a turn signal, and it initially turned into the wrong lane of traffic. Therefore, he activated his lights and sirens to effectuate a traffic stop. The red Beretta then fled. Trooper Taylor gave chase and a video recording of the chase was admitted at trial. The chase lasted for about 12 miles and ended in Newaygo County. Trooper Taylor lost sight of the red Beretta during the last ten minutes of the chase, but located the car in a private residence's yard near the wood line. No one was in the car.

Trooper Taylor began searching the area for the car's occupants. Trooper Michael Stephens joined him in the search. They located Castillo in the woods, approximately 400 to 500 yards from the car. Both testified that Castillo screamed incoherently at them and appeared high. He was irrational, did not comply with orders, was highly aggressive, and tried to attack the officers. Castillo was tazed four times before he was subdued and arrested.

When Trooper Watson arrived during the search that located Castillo, he noticed a pair of glasses sitting on top of the red Beretta toward the passenger side. They appeared to be the ones he saw the passenger wearing. Trooper Watson stated that when Castillo was brought out of the woods, he immediately recognized him as the passenger in the car. Even though Castillo was not wearing glasses at the time, Trooper Watson was 100 percent sure that Castillo was the passenger in the red Beretta involved in the chase. He was 80 percent sure that Smith was the driver. He could not be 100 percent sure because he did not focus on the driver long enough. At trial, Trooper Watson stated that Smith's hair color was about the same shade as Castillo's hair color. In his booking photograph, however, Smith's hair was lighter and appeared closer to the shade of the driver's hair.

Deputy Robert McVey testified that at Detective Abendroth's request, he interviewed Smith in jail on June 6, 2006, 11 days after Smith was arrested. According to Deputy McVey, Smith's hair appeared lighter, he did not seem tired, and he did not appear to be under the

influence of any drugs. Deputy McVey stated that he had a few details about the offense at the time of the interview. He asked Smith about the incident, and Smith denied any involvement in the fleeing and eluding. Deputy McVey contacted Detective Abendroth on the phone to obtain some more details. The phone's speaker was on and Smith was able to hear Deputy McVey's conversation with Detective Abendroth. Deputy McVey stated that Smith then admitted fleeing from the police. He stated that Smith was very coherent during his confession.

Deputy McVey testified that Smith said that he had been smoking methamphetamine earlier with Castillo and that it had made him extremely paranoid. When the police attempted to stop him, he became scared and fled. He stashed the car in the woods, left Castillo in the passenger seat, and had a very long walk home. Deputy McVey stated that Smith wanted to protect Castillo because he was a friend, but never indicated that Castillo was the driver. The jury found Smith guilty of third-degree fleeing or eluding.

After Smith filed a claim of appeal, this Court granted his motion to remand to allow him to file "a motion for dismissal, new trial, correction of judgment of sentence and to delete the assessment of attorney fees."³ On remand, Smith filed such a motion and presented eight arguments, the first six of which are now reargued on appeal.⁴

The trial court found that there was no double jeopardy violation when the prosecutor filed charges in Mecosta County because a jury had not been empanelled in the Newaygo County case. MCL 762.9 allowed charges to be filed in either county based on the circumstances of the offense. The trial court also found that Smith offered no evidence to prove actual prosecutorial vindictiveness. Thus, because Smith was properly prosecuted in Mecosta County, Smith's trial counsel, David Duvall, was not ineffective for not filing a motion to dismiss.

In regard to Duvall's stipulation to Smith's fourth-degree fleeing or eluding conviction, the trial court stated that because the conviction was an element of the charged offense, Duvall could not stipulate to an "unspecified felony." Thus, Smith's argument had no legal basis. The trial court also stated that even if Duvall could stipulate to an "unspecified felony," not doing so could be considered reasonable trial strategy that it would not second-guess. Thus, Duvall was not ineffective for failing to offer to make such a stipulation. The trial court further found that it improperly instructed the jury that it could consider Smith's conviction for fourth-degree fleeing or eluding in assessing his truthfulness. However, the error was harmless because substantial evidence had been presented to support Smith's conviction. The trial court noted the testimony of Hall, Trooper Watson, and Smith's confession.

Regarding the failure to call an allegedly exculpatory witness, Jaime McCallum, the trial court found DuVall's testimony, that he was unaware after speaking with her and Smith that she had pertinent information, more credible. It based this finding on the fact that McCallum had sat

³ *People v Smith*, unpublished order of the Court of Appeals, entered February 22, 2008 (Docket No. 279499).

⁴ Smith's issues involving the assessment of attorney fees and a clerical mistake in the judgment of sentence were resolved on remand.

silently through Smith's trial and did not mention the information in the letter she wrote to the trial court. The trial court concluded that the prosecutor made an improper civic duty argument when he encouraged the jury to hold Smith responsible for all the people he endangered. However, the error was harmless because it did not affect the outcome of the case based on the substantial evidence presented to support Smith's conviction. The trial court stated that because Smith could not show that the error was outcome determinative, he could not show that he was denied the effective assistance of counsel when Duvall failed to object to the remarks.

Lastly, the trial court found that Smith was not entitled to jail credit because he was on parole at the time of the offense, relying on *People v Stead*.⁵ It stated that Smith's argument that he was entitled to credit because the parole board imposed no additional time for his parole violation was better addressed by the appellate courts because it involved a policy argument and asked the court to rule against the clear state of the law. Accordingly, the trial court denied Smith's motion for a new trial. Smith's appeal is now again before this Court.

II. Refiling Of Charges In Mecosta County

A. Standard Of Review

Smith argues that the charge filed in Mecosta County, after dismissal of an identical charge in Newaygo County, constituted unfair harassment that violated his due process rights. Smith did not preserve this issue by raising it before the trial court. We review unpreserved claims for plain error affecting substantial rights.⁶ However, even if there is plain error, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."⁷

B. Applicable Legal Principles

"The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power."⁸ "[R]epeated prosecutions of a defendant for the same offense violate the defendant's right to due process."⁹ "Among the factors to be considered in determining whether a due process violation has occurred are the reinstatement of charges without additional, noncumulative evidence not introduced at the first preliminary examination, the reinstatement of charges to harass and judge-shopping to obtain a favorable ruling."¹⁰

⁵ *People v Stead*, 270 Mich App 550; 716 NW2d 324 (2006).

⁶ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁷ *Id.* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

⁸ *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998).

⁹ *People v Vargo*, 139 Mich App 573, 578; 362 NW2d 840 (1984).

¹⁰ *Id.*

C. Applying The Law

There is no basis in the record for concluding that the decision to charge Smith in Mecosta County was motivated by an improper purpose. The charge in Newaygo County was dismissed because a critical prosecution witness failed to appear for trial. Smith does not dispute that the Mecosta County prosecutor had the authority to file a similar charge against him given that the crime occurred in both jurisdictions.¹¹ It does not appear that the filing of the charge in Mecosta County was an attempt to “judge-shop” and obtain a favorable ruling. And there is no evidence that the prosecutors from the two counties colluded in bringing the charge in Mecosta County in an effort to harass defendant. Accordingly, we find no plain error and we find that the trial court did not abuse its discretion in denying Smith’s posttrial motion for relief on this basis.

III. Prosecutorial Misconduct

A. Standard Of Review

Smith argues that certain portions of the prosecutor’s closing argument constituted an improper civic duty argument. Smith did not preserve this issue by raising it before the trial court. We review unpreserved claims for plain error affecting substantial rights.¹²

B. Applicable Legal Principles

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.¹³ Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate the prosecutor’s remarks in context.¹⁴ “The propriety of a prosecutor’s remarks depends on all the facts of the case.”¹⁵ Prosecutorial comments must be read as a whole and evaluated in light of the relationship they bear to the evidence admitted at trial.¹⁶

A prosecutor may not urge jurors to convict a defendant as part of their civic duty.¹⁷ We condemn such arguments because they inject issues into the trial that are broader than a defendant’s guilt or innocence, and because they encourage the jurors to suspend their own powers of judgment.¹⁸

¹¹ MCL 762.8; MCL 762.9.

¹² *Carines*, *supra* at 763-764.

¹³ *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

¹⁴ *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

¹⁵ *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

¹⁶ *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

¹⁷ *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

¹⁸ *Id.*

C. Applying The Law

During closing argument, the prosecutor remarked at the beginning of his argument:

When we—when we—talk about this case, ladies and gentlemen, when you think about it, it's question, very simply, and taking the big picture here, this is a question of responsibility, okay? Mr. Smith tried to elude the police back in May, 2006. And he's trying to elude you today, he's trying to get away with it. He's trying to elude justice today, just like he was back then, isn't he? He needs to be held responsible for all the people that he placed in danger: police officers, children on a school bus, himself even, Mr. Castillo, whoever. Whoever could have been at risk, he needs to be held responsible for that. You're the final link in the chain of justice.

At the end of his argument, the prosecutor stated:

The police did their job. We presented this case as best we could. I am asking that you hold him responsible for endangering all the lives that he did on May 16th of 2006. Find him guilty for fleeing and eluding, third degree. Don't let him get away with this. Don't let him elude justice anymore. Thank you.

We do not agree with the trial court that the prosecutor's arguments were improper. The challenged remarks occurred at the beginning and the end of the prosecutor's closing argument. In between, the prosecutor summarized the evidence and explained how the evidence supported the charge and why Smith's testimony was not worthy of belief. Viewed in context, the prosecutor was not asking the jury to convict Smith as part of a civic duty, but because the evidence warranted it, which is permissible.¹⁹ Accordingly, there was no plain error.

IV. Sentence Credit

A. Standard Of Review

Smith argues that he is entitled to jail credit for time served because the parole board assessed no additional time as a result of his parole violation. We review *de novo* questions of law regarding statutory interpretation.²⁰

B. Analysis

MCL 769.11b provides that when a person convicted of a crime has served time in jail before sentencing "because of being denied or unable to furnish bond" for the convicted offense, he is entitled to credit "against the sentence for such time served in jail prior to sentencing."

¹⁹ See *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005).

²⁰ *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).

As explained in *People v Stead*:²¹

“When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense.” *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. *Id.* Credit is not available to a parole detainee for time spent in jail attendant to a new offense because “bond is neither set nor denied when a defendant is held in jail on a parole detainer.” *Id.* at 707.

Smith was on parole at the time of his arrest for the offense here and was held in jail on a parole detainer. Smith concedes that the current state of the law does not entitle him to sentence credit against his new sentence.²²

However, Smith urges this Court to adopt the result reached in *People v Vassar*²³ and declare a conflict with *Stead*. In *Vassar*, the panel held that a remand was necessary to determine if the trial court credited the defendant’s sentence from which he was paroled. It stated that if the defendant

was not required to serve any additional time on his prior sentence, there would be no prior sentence against which to credit his jail time served. In that situation, MCL 769.11b would require that defendant be credited with the 281 days of jail time previously served against the sentence imposed in the present case.^[24]

Smith argues that to hold otherwise impermissibly increases his instant sentence and contravenes MCL 768.7a(2),²⁵ as interpreted in *Wayne Co Prosecutor v Dep’t of Corrections*.²⁶

²¹ *Stead, supra* at 551-552. See also *People v Filip*, 278 Mich App 635, 641-642; 754 NW2d 660 (2008).

²² See *Stead, supra* at 551-552.

²³ *People v Vassar*, unpublished opinion of the Court of Appeals, issued April 1, 2003 (Docket Nos. 231246, 231248).

²⁴ *Id.*, slip op at 4.

²⁵ MCL 768.7a(2) provides:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

²⁶ *Wayne Co Prosecutor v Dep’t of Corrections*, 451 Mich 569; 548 NW2d 900 (1996).

But the *Stead* Court addressed the interplay of MCL 769.11b and MCL 768.7a(2), and found no conflict between its holding that a parole detainee defendant is not entitled to credit against his sentence for a new offense and the holding in *Wayne Co Prosecutor*.²⁷ Notably, Smith does not explain why *Stead* was incorrectly decided, and it is not this Court's responsibility to make defendant's argument for him.²⁸ Moreover, in *People v Filip*,²⁹ this Court made clear that a defendant is not entitled to credit against a new sentence for time spent incarcerated on a parole detainer even where he is required to serve no additional time on the sentence from which he was paroled.³⁰

Based on Smith's failure to adequately brief this issue and the solid state of the law, there is no reason not to follow the precedent set by this Court. Therefore, Smith was not entitled to a credit against his new sentence.

V. Ineffective Assistance Of Counsel

A. Standard Of Review

Smith's ineffective assistance of counsel claims are preserved because he raised them in a motion for a new trial and the trial court conducted an evidentiary hearing.³¹ We review for an abuse of discretion a trial court's decision denying a motion for a new trial.³² An abuse of discretion occurs when the result is outside the range of reasonable and principled outcomes.³³

The determination whether a defendant was deprived of the effective assistance of counsel is a mixed question of fact and constitutional law.³⁴ The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.³⁵ A finding is clearly erroneous when, although there is evidence to support it, this Court on the whole record is left with a definite and firm conviction that a mistake was made.³⁶ We give

²⁷ *Stead, supra* at 551-552.

²⁸ *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

²⁹ *Filip, supra* at 642.

³⁰ See also *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994) (holding that a parole detainee defendant is not entitled to credit on a new sentence even where the parole board abandons parole violation proceedings).

³¹ *Rodriguez, supra* at 38.

³² *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

³³ *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

³⁴ *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008).

³⁵ *Id.*

³⁶ *Id.* at 130.

regard to the trial court's opportunity to assess the credibility of the witnesses who appeared before it.³⁷

The right to counsel guaranteed by the United States and Michigan Constitutions³⁸ is the right to the effective assistance of counsel.³⁹ To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different.⁴⁰

B. Failure To Object To The Refiling Of Charges In Mecosta County

Because there is no basis for concluding that Smith was improperly charged in Mecosta County, Duvall was not ineffective for failing to file a motion to dismiss the charge. An attorney is not required to make a futile motion or objection.⁴¹

C. Failure To Request An Award Of Credit

Because Smith was not entitled to a sentence credit, Duvall was not ineffective for failing to request an award of credit.⁴²

D. Failure To Object To Alleged Prosecutorial Misconduct

Because there was no plain error, Duvall was not ineffective for failing to object to the prosecutor's alleged misconduct.⁴³

E. Failure To Stipulate to "Unspecified Felony"

Smith was charged with third-degree fleeing or eluding because he had a prior conviction for fourth-degree fleeing or eluding.⁴⁴ At trial, the parties stipulated that Smith was previously convicted of fourth-degree fleeing or eluding. Smith now argues that the evidence of his prior

³⁷ *Id.*

³⁸ US Const, Am VI; Const 1963, art 1, § 20.

³⁹ *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

⁴⁰ *Dendel*, *supra* at 125.

⁴¹ *People v Unger (On Remand)*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ MCL 257.602a(3)(c) provides that a driver who fails to obey a police officer's signal to stop his or her vehicle is guilty of third-degree fleeing and eluding if he or she also has a prior conviction for fourth-degree fleeing and eluding.

conviction was unduly prejudicial and that Duvall was ineffective for not offering to stipulate that Smith was previously convicted of an “unspecified felony.”

We disagree with Smith’s argument that Duvall was ineffective for not offering to stipulate that Smith was previously convicted of an “unspecified felony” and by instead revealing that the nature of the prior conviction was for fleeing or eluding a police officer. In his testimony, Smith used the prior fleeing or eluding conviction to explain his alleged confession to the charge in this case. Smith asserted that he admitted fleeing from the police, but explained that he was referring to his prior fleeing or eluding conviction and that the police must have misunderstood him as referring to the present offense. Under these circumstances, where the prior fleeing or eluding conviction was used strategically to provide an exculpatory explanation for Smith’s alleged confession, Duvall was not ineffective for not offering to stipulate that Smith was previously convicted of some unspecified felony rather than fleeing or eluding. Indeed, DuVall testified that he did not offer to stipulate to an “unspecified felony” because he was concerned that the jury would speculate about the felony. To avoid having Smith’s driving record admitted, he stipulated to Smith’s prior conviction of fourth-degree fleeing or eluding. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.⁴⁵

F. Failure To Object To Jury Instruction

Smith argues that Duvall was ineffective for not objecting to the trial court’s improper jury instruction that allowed the jury to consider Smith’s prior conviction for purposes of assessing his credibility.

The parties agree that the trial court improperly instructed the jury that Smith’s prior fleeing or eluding conviction could be considered in assessing Smith’s credibility. Because the prior conviction was not for an offense involving dishonesty, theft, or false statement, it could not be used for impeachment under MRE 609(a). Although Duvall performed deficiently by failing to object to the improper instruction, we agree with the trial court that there is no reasonable probability that the result of trial would have been different but for this error. The jury instruction was permissive. It did not require that the jury discount Smith’s testimony because he had a prior conviction. Trooper Watson’s identification testimony and Deputy McVey’s testimony regarding Smith’s confession contradicted Smith’s assertion that he was not the driver and were independent grounds to question Smith’s credibility. Further, Smith admitted that he would be willing to lie to secure his freedom. Thus, Duvall’s failure to object to the trial court’s instruction did not prejudice Smith. Accordingly, the trial court did not abuse its discretion in denying Smith’s motion for a new trial on this basis.

G. Failure To Object To Jury Composition

Smith argues that Duvall was ineffective for failing to challenge jurors Fetterley and Mursch for cause. Smith asserts that both jurors gave responses during voir dire that indicated

⁴⁵ *Unger, supra* at 258.

they could not be impartial or were biased. “Jurors are presumptively competent and impartial”⁴⁶ A juror may be excused for cause based on a demonstrated bias for or against a party, if he or she shows a state of mind that will prevent that person from rendering a just verdict, or if he or she has opinions that would improperly influence that person’s verdict.⁴⁷ “An attorney’s decisions relating to the selection of jurors generally involve matters of trial strategy.”⁴⁸

During voir dire, Fetterley stated that she might consider a police officer’s testimony more credible than a layperson’s testimony, because she had a lot of respect for law enforcement and the law. When asked if she would be more neutral if she were instructed that a police officer should not be considered more credible simply because of his occupation, Fetterley responded, “I would try my best, but I can’t guarantee that.” At the hearing on Smith’s motion for a new trial, the trial court found that Fetterley’s statement did not amount to an affirmative indication of bias. This finding is not clearly erroneous. Fetterley’s caveat that she could not “guarantee” how she would react does not sufficiently detract from her promise to do her best to follow the court’s instructions regarding credibility. Furthermore, as this Court explained in *Unger*:

Perhaps the most important criteria in selecting a jury include a potential juror’s facial expressions, body language, and manner of answering questions. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). However, as a reviewing court, we “cannot see the jurors or listen to their answers to voir dire questions.” *Id.* at 94. For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney’s failure to challenge a juror. *Id.* at 95.^[49]

At the posttrial hearing, Duvall stated that he could not remember any specifics about the jurors. At trial, however, Duvall remarked that Fetterley’s response to his question was “a fair answer,” suggesting that he sensed that she was making a sincere effort to be forward and honest. Because there was no clear showing that Fetterley was partial or biased, or was incapable of rendering a jury verdict, Smith has not overcome the presumption that Duvall’s decision not to challenge her for cause was reasonable trial strategy.

Smith argues that juror Mursch should have been challenged for cause because she stated that if Smith did not testify, she “might” use that against him. To the extent that Mursch’s response raised a concern whether she could fairly decide the case if Smith did not testify, that concern evaporated when Smith ultimately testified at trial. Smith was therefore not prejudiced by Duvall’s failure to challenge juror Mursch for cause. For these reasons, the trial court did not abuse its discretion in denying Smith’s motion for a new trial on this basis.

⁴⁶ *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001).

⁴⁷ MCR 2.511(D); *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000).

⁴⁸ *Johnson*, *supra* at 259.

⁴⁹ *Unger*, *supra* at 258.

H. Failure To Call Exculpatory Witness

At the evidentiary hearing held on remand, Jamie McCallum testified that she met Smith on May 16, 2006, when he and Castillo showed up at her house in a maroon Beretta between 11:00 a.m. and noon. According to McCallum, Castillo and Smith then left just after 3:00 p.m., and Castillo, not Smith, was driving.

Before the trial here began, McCallum wrote a letter to the trial court regarding her concern about Smith being prosecuted again. But McCallum admitted that she did not mention that she had information helpful to Smith. McCallum further testified that she was present throughout Smith's trial in Mecosta County, but said nothing regarding the information she had until after jury deliberations began when she mentioned it to Trooper Watson in the prosecutor's presence.

Smith argues that Duvall was ineffective for failing to investigate and discover the importance of Jamie McCallum's testimony, and by failing to call McCallum to testify at trial. Decisions regarding what witnesses to call are matters of trial strategy.⁵⁰ While we afford deference to counsel's strategic judgments, strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation.⁵¹ The failure to call a witness can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense.⁵²

Smith asserts that Duvall had a duty to review the court file in the previous Newaygo County case and, had he done so, he would have discovered that McCallum was listed on the defense witness list. However, nothing in the file revealed the substance of her proposed testimony. Regardless, the evidence showed that Duvall was aware of McCallum and spoke to her before trial. And, according to Duvall, neither McCallum nor Smith ever revealed that she possessed information that might be beneficial to Smith's case, and Duvall determined that the extent of her involvement was that she was present during Smith's arrest. Thus, Smith's claim that Duvall's investigation was insufficient is without merit.

Nevertheless, Smith contends that Duvall became aware of the substance of McCallum's exculpatory testimony before trial, relying on his and McCallum's testimony at the evidentiary hearing. The trial court found Duvall's testimony on this matter more credible. Smith made no reference to McCallum in his trial testimony, and McCallum did not mention the exculpatory information in her pretrial letter to the court; she only revealed it after jury deliberations began. Therefore, giving due deference to the trial court's assessment of the witnesses' credibility, we find no clear error in the trial court's determination.⁵³ Given Duvall's knowledge at the time of trial regarding McCallum's limited role, his decision not to call McCallum as a witness was not

⁵⁰ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

⁵¹ *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

⁵² *Dixon*, *supra* at 398.

⁵³ *Dendel*, *supra* at 130.

objectively unreasonable. Thus, Smith was not denied the effective assistance of counsel, and the trial court did not abuse its discretion in denying Smith's motion for a new trial on this basis.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly