STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 18, 2006
v	No. 260502 Genesee Circuit Court
MOSES KEON WILLIAMS, Defendant-Appellant.	LC No. 04-014492-FC

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 25 to 50 years' imprisonment for the second-degree murder conviction, to be served consecutively to concurrent sentences of six months' imprisonment for the CCW conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the April 5, 2004, shooting death of Edward Beasley, who died of multiple gunshot wounds inflicted while he sat in the driver's seat of his Cadillac. While inside the Cadillac with Beasley, defendant, and codefendant Tommy Louis Tiggs, witness Carole Cooper heard either defendant or Tiggs say "Is you ready." According to Cooper, Tiggs then got out of the car and a gunshot was fired. Cooper testified that she then turned around and saw Tiggs with a gun. She stated that the gun jammed while Tiggs was attempting to fire a second shot. Cooper indicated that she then saw defendant standing behind the car and shooting through the back window of the vehicle. Cooper did not know whether Tiggs or defendant was the person who said "Is you ready." The evidence showed that the bullets extracted from Beasley's body had been fired from both Tiggs's gun and defendant's gun.

Cooper selected defendant's picture from a photo array. Cellular phone records confirmed that several calls were placed between defendant's phone and Cooper's phone on the day of the shooting. Beasley had been using Cooper's phone in an attempt to sell his Cadillac to defendant. Cellular phone records further confirmed two calls immediately before the shooting, made by defendant to verify Beasley's title to the vehicle. After the shooting, Tiggs's uncle called defendant's cellular phone and asked the man who answered if "one of you guys killed my nephew." The man responded, "yep, and you gonna be next."

Defendant first argues that the trial court abused its discretion and effectively denied him his right to present a defense by denying his request to present alibi witness Kessa Peters. We disagree. We review for an abuse of discretion a trial court's decision regarding the admission of evidence. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court relied, would find that there was no justification or excuse for the ruling made. *Id*.

MCL 768.20 requires that a defendant intending to present an alibi defense at trial provide the prosecutor written notice of that intent not less than ten days before trial. In *People v Travis*, 443 Mich 668, 682; 505 NW2d 563 (1993), our Supreme Court, quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977), articulated five factors to consider in determining whether to exclude the testimony of undisclosed alibi witnesses:

> "(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case."

The Court specifically recognized that these factors apply when a defendant fails to file the required notice of alibi. *Id.*

Here, the trial court did not abuse its discretion by denying defendant's request to present an alibi witness. Defense counsel did not indicate an intent to call Peters as an alibi witness until four days before trial. Nevertheless, the prosecutor was willing to excuse the late notice if Peters contacted Sergeant Jennifer Besson, the officer in charge of the case, by 3:00 p.m. on the day before trial. Peters failed to contact Besson by the designated time, but thereafter left a message indicating that she would testify that defendant was with her in Columbus, Ohio, at the time of the shooting. The prosecutor indicated that Peters's untimely message was inacceptable because it did not allow Besson sufficient time to investigate the alibi claim. The prosecutor further indicated that because Peters did not have a telephone and did not provide an address, she had no way of getting in touch with Peters or sending an officer to contact her. Thus, the prosecutor stated that she had no way of adequately investigating the defense.

The prosecutor's argument at trial evidences the prejudice resulting from the late disclosure of alibi witnesses. The prosecutor was unaware of the specifics of Peters's purported testimony and, without any way to contact Peters, the prosecutor had no means of investigating the claimed alibi defense or ascertaining the details of Peters's testimony before she testified. The trial court acknowledged the prejudice to the prosecutor when it denied defendant's request. Defendant's argument that he was denied the opportunity to present a defense fails because he could have presented other witnesses or testified himself in support of his asserted alibi defense. In fact, the trial court explicitly ruled that if defendant chose to present his alibi defense in Peters's absence, the prosecutor could not comment on his failure to produce corroborating witnesses. The trial court adequately protected defendant's rights and did not deny defendant the opportunity to present a defense.

Moreover, other evidence properly admitted at trial tended to establish defendant's guilt. Cooper selected defendant's picture out of a photo array and identified him as one of the

shooters. Further, defendant's cellular phone records indicated that he was not in Ohio on the day of the shooting. Jennifer DeMaria of Cricket Communications, defendant's cellular phone service provider, testified that her company is a local cellular phone company, which does not offer roaming outside the local area. She testified that the local calling area is "from Clio to Grand Blanc and Flushing to just short of Davison." Therefore, defendant's cellular phone records indicate that he was in the local calling area on the day of the shooting rather than in Ohio. Particularly in light of the evidence tending to contradict the asserted alibi defense, the trial court did not abuse its discretion by denying defendant's request to present the proposed alibi witness.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, this Court's review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "'Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.'" *Id.*, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id*. at 302.

Defendant argues that trial counsel was ineffective for failing to request a continuance to allow the police time to investigate the alibi defense. Defendant also faults defense counsel for failing to request the assistance of an investigator to assist in contacting Peters before trial. Defendant's arguments lack merit. Although defense counsel did not request a continuance on the first day of trial, December 7, 2004, he did request that the trial court allow him until December 9, 2004, to secure Peters's presence at trial. The trial court denied this request. Accordingly, a request for a continuance would have been futile. Counsel is not ineffective for failing to make a futile argument or advocate a meritless position. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Further, defendant was not prejudiced by trial counsel's failure to employ an investigator to assist in contacting Peters. As previously discussed, defendant was not denied the opportunity to present an alibi defense and could have called witnesses other than Peters to support his defense. In addition, the evidence, including defendant's cell phone records, tended to show that defendant was not with Peters in Ohio on the day of the offense, but rather was in the Flint area. Therefore, defendant has failed to demonstrate a reasonable probability that, but for counsel's failure to more fully pursue the asserted alibi defense, the result of the proceeding would have been different. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

Defendant also argues that counsel was ineffective for failing to request a jury instruction directing the jury to consider Cooper's testimony more cautiously than it would the testimony of

an ordinary witness. Specifically, defendant argues that counsel should have requested a jury instruction pertaining to addict-informants. "'[A]n instruction concerning special scrutiny of the testimony of addict-informants should be given upon request, where the testimony of the informant is the *only* evidence linking the defendant to the offense.'" *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999) (emphasis added), quoting *People v Smith*, 82 Mich App 132, 133-134; 266 NW2d 476 (1978). Here, although Cooper testified that in the early morning hours of April 5, 2004, she was using cocaine, drinking alcohol, and "partying" with Beasley, the evidence did not show that Cooper was an addict. Indeed, in *Griffin, supra* at 40, this Court determined that the evidence did not indicate that the informant was an addict at the time in question, despite having been twice arrested for selling drugs, admitting that he had a crack cocaine dependency for five years, and stating that he once used drugs four or five times a week. In the instant case, Cooper repeatedly testified that she was not intoxicated during the incidents about which she was testifying. Because the evidence did not indicate that Cooper was an addict, an addict-informant instruction would not have been proper. *Id*. Moreover, Cooper's testimony was not the *only* evidence linking defendant to the shooting. *Id*. Trial counsel was not ineffective for failing to request the unwarranted addict-informant jury instruction. *Snider, supra* at 425.

Defendant also argues that defense counsel was ineffective for failing to call witness Germane Ross to challenge Cooper's testimony. Decisions regarding which witnesses to present at trial are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of trial counsel regarding such matters. *People v Davis*, 250 Mich App 357; 368; 649 NW2d 94 (2002). Defendant argues that there were "several discrepancies" between Cooper's testimony and the testimony that Ross purportedly would have given. But, defendant fails to give any indication regarding the substance of those alleged discrepancies. Defendant has not properly presented this issue for review. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, defendant fails to indicate what Ross would have testified about had he been called as a witness. Thus, even if this issue were properly before us, defendant has failed to establish a reasonable probability that the result of the proceeding would have been different if Ross had testified. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

To the extent that defendant argues that the cumulative effect of trial counsel's errors denied him a fair trial, no cumulative error could have occurred in the absence of any individual errors. *People v Rodriguez*, 251 Mich App 10, 37; 650 NW2d 96 (2002).

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood