

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH T. ROBINSON,

Defendant-Appellant.

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UNPUBLISHED

October 24, 2013

No. 298929

Wayne Circuit Court

LC No. 95-010596

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Defendant appeals the trial court's denial of his motion for relief from judgment. For the reasons set forth below, we affirm.

**I. FACTS AND PROCEDURAL HISTORY**

On July 1, 1995, Ajena Sims was shot to death while walking upstairs to her apartment in a house at 13625 Trumbull in Highland Park. Durrell Sims, the decedent's husband, and a family friend, Collins Dingle, testified that they left the apartment at approximately 11:00 a.m. to make a telephone call at a nearby convenience store and Mrs. Sims was alive when they left. Mr. Sims and Mr. Dingle testified that, as they were returning to the apartment, defendant confronted them in an alley. They further testified that defendant fired a shot into Mr. Sims's chest and fired several shots in Mr. Dingle's direction as he fled the scene. Mr. Sims was able to get up to run and defendant fired another shot in his direction, this time missing him. At trial, evidence showed that the shots that killed Mrs. Sims and those that injured Mr. Sims came from the same firearm. The police responded to the shooting of Mr. Sims at approximately 11:30 a.m., and he was taken to a hospital for immediate surgery. Trial evidence also showed that, a few days earlier, Mr. Sims had a confrontation with defendant after Mrs. Sims complained that defendant had been flirting with her and had grabbed her. During the physical altercation between Mr. Sims and defendant, defendant reached for a gun, but Mr. Sims took the gun away from him. The record does not reveal what happened to that gun.

At trial, defendant presented an alibi defense, and witnesses testified that he was at a baseball game in Detroit when the crimes occurred. Defendant's brother testified that, on July 1, 1995, he and defendant went to the baseball field with their mother just before 10:00 a.m., and that defendant sat in the car until the games ended at around noon. Ike Orton testified that he met defendant for the first time at the ballpark on July 1, 1995, around 1:00 p.m., when he talked

to defendant's mother in the parking lot after the games. Defendant's mother, Marsha Ross, confirmed that defendant was with her at the baseball games, that he stayed in the car the whole time, and that she talked to Mr. Orton after the games until about 1:00 p.m. She also testified that they then went to a grocery store, and arrived home around 2:00 p.m.

The prosecution presented the ballistics evidence showing that the bullets that injured Mr. Sims and killed Mrs. Sims came from the same weapon, though the gun was never found. The prosecutor also presented other witness testimony, including the identification of defendant by Mr. Sims, Mr. Dingle, and Michael Ware, who was 14 years old and lived at 13708 Trumbull, three houses from the Sims's apartment house. Mr. Ware testified that he knew who defendant was, that defendant lived three houses away from him, and that, on two or three occasions, he had seen defendant argue with a woman in front of another house on Trumbull. Mr. Ware further testified that, at approximately 11:45 a.m. on the day of the murder, he saw defendant walking quickly down Trumbull while looking over his shoulder. According to Mr. Ware, defendant walked to the same house on Trumbull where he had seen defendant argue with the woman. Mr. Ware recalled that defendant had a black gun in his right hand, defendant entered the house, Mr. Ware heard three or four gunshots, and defendant ran out of the house and across a field. Mr. Ware stated that the police arrived within four or five minutes, and he later identified defendant from photographs at the police station.

In 1996, a jury convicted defendant of first-degree murder, two counts of assault with intent to murder, and felony-firearm. Defendant challenged his convictions on appeal and argued that the prosecutor intentionally excluded African Americans from serving on his jury, the court erroneously excluded evidence of domestic violence between Mr. and Mrs. Sims, and that the trial court improperly prohibited defense counsel from using a hat for demonstrative purposes during closing arguments. In *People v Robinson*, unpublished amended opinion per curiam of the Court of Appeals, issued August 26, 1997 (Docket No. 195877), this Court rejected all of defendant's claims of error and affirmed his convictions. On May 28, 1998, our Supreme Court denied defendant's application for leave to appeal. *People v Robinson*, 457 Mich 882; 586 NW2d 924 (1998).

In 2009, through the Michigan Innocence Clinic, defendant filed a motion for relief from judgment pursuant to MCR 6.508(D). Defendant claimed that he was denied the effective assistance of counsel and that he obtained newly discovered evidence concerning the time of Mrs. Sims's death. The trial court denied defendant's motion, and defendant filed a delayed application for leave to appeal in this Court. This Court denied defendant's application, but our Supreme Court remanded the case as on leave granted. *People v Robinson*, 490 Mich 988; 807 NW2d 165 (2012). In this Court, defendant filed a motion to remand the case for an evidentiary hearing, which this Court initially denied. *People v Robinson*, unpublished order of the Court of Appeals, issued March 27, 2012 (Docket No. 298929). However, on reconsideration, this Court granted defendant's motion to remand, in part, in an unpublished order. *People v Robinson*, unpublished order of the Court of Appeals, issued April 23, 2012 (Docket No. 298929). This Court ordered the trial court to conduct an evidentiary hearing, limited to the issues raised in the motion to remand, and "to make findings of fact and a determination on the record." *Id.*

On remand, the trial court took testimony from various witnesses, considered the arguments of counsel, and again denied defendant's motion for relief from judgment in a ruling from the bench. Defendant challenges the trial court's ruling on appeal.

## II. STANDARDS OF REVIEW AND APPLICABLE LAW

"This Court reviews for an abuse of discretion a trial court's denial of a defendant's motion for relief from judgment." *People v Fonville*, 291 Mich App 363, 375-376; 804 NW2d 878 (2011). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.* at 376.

"The defendant has the burden of establishing entitlement to" relief from judgment. MCR 6.508(D). The grounds on which defendant brought his motion for relief from judgment were ineffective assistance of counsel and newly discovered evidence. As noted, defendant asserted a claim of ineffective assistance of counsel in his prior appeal. Pursuant to MCR 6.508(D)(3), a court may not grant relief from judgment if a defendant alleges a ground for relief which could have been raised in a prior appeal or motion, unless the defendant demonstrates:

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

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(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case . . . .

"The requirement of 'good cause' [in MCR 6.508(D)(3)(a)] can be established by proving ineffective assistance of counsel." *People v Swain*, 288 Mich App 609, 631; 794 NW2d 92 (2010). This ground for "good cause" may apply to trial counsel or appellate counsel. *Id.*; *People v Gardner*, 482 Mich 41, 50 n 11; 753 NW2d 78 (2008).

With regard to newly discovered evidence, as our Supreme Court opined in *People v Grissom*, 492 Mich 296, 312-313; 821 NW2d 50 (2012):

Historically, Michigan courts have been reluctant to grant new trials on the basis of newly discovered evidence. This policy is consistent with requiring parties to "use care, diligence, and vigilance in securing and presenting evidence." We have identified several evaluative criteria to apply when determining whether a new trial may be granted because of newly discovered evidence. We have explained that a defendant must show that

(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.

This test has been applied consistently for more than a century, and we do so here.

### III. ASSISTANCE OF COUNSEL

As our Supreme Court explained in *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012):

Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. Const 1963, art 1, § 20; US Const, Am VI. In order to obtain a new trial, a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.

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In examining whether defense counsel’s performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel’s performance was born from a sound trial strategy. *Strickland [v Washington]*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).] Yet a court cannot insulate the review of counsel’s performance by calling it trial strategy. Initially, a court must determine whether the “strategic choices [were] made after less than complete investigation,” and any choice is “reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690–691. Counsel always retains the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.*

We hold that the trial court correctly ruled that defendant failed to establish that defendant’s trial attorney provided ineffective assistance of counsel.

In his motion and at the evidentiary hearing, defendant presented evidence that Mrs. Sims must have died between 9:00 and 10:00 a.m. on July 1, 1995, rather than later, as witnesses testified at trial. Defendant presented the testimony of Dr. Jeffrey Jentzen, who testified as an expert in forensic pathology. Dr. Jentzen concluded that, based primarily on the EMT’s notation that Mrs. Sims showed signs of lividity in her hands when first assessed at the scene, it was not scientifically plausible that she died after 11:00 a.m. when Mr. Sims and Mr. Dingle left the apartment, and that it is more plausible that she died between 9:30 and 10:00 a.m. Defendant also presented the testimony of Krystyan Anderson, who was 11 years old when the crime occurred. He lived in the apartment below the Sims’s residence and was home alone with his younger brother when he heard noises in the stairway up to the Sims’s apartment. Mr. Anderson

testified that he heard Mrs. Sims repeatedly tell someone to “shut up,” and then he heard three “pops” that “sounded like a stick hitting the stair.” He also heard someone who sounded like Mrs. Sims repeatedly say “ouch.” Mr. Anderson talked to the police, but did not speak to any attorneys about what he heard until the Michigan Innocence Clinic contacted him in 2009. Mr. Anderson testified that he heard the commotion in the stairwell as he was watching a television program called “Reboot” which aired at 9:30 or 10:00 a.m., as confirmed by the television listing on that date. On cross-examination, Mr. Anderson testified that he could not remember anything about the episode of Reboot or the other television programs he watched on the morning of the shooting, but he remembered Reboot was especially popular among his friends.

Defendant contends that defendant’s trial counsel and appellate counsel should have better investigated the time of Mrs. Sims’s death and talked to and presented the testimony of Mr. Anderson at trial and on appeal. However, in light of the evidence presented at trial, it was clearly sound trial strategy for defense counsel to present an alibi defense. As discussed, Mr. Ware testified that the shooting inside the Sims’s apartment occurred at approximately 11:45 a.m., and he specifically stated that defendant entered the apartment with a gun right before shots were fired, and that defendant ran out immediately afterward. While Mr. Ware now claims that he could not actually identify defendant as the person who entered the apartment, he again testified that he heard the shooting and that it occurred minutes before police arrived at the Sims’s residence, which was at approximately 11:50 a.m. At trial, Mr. Sims and Mr. Dingle testified that they left the apartment at 11:00 a.m. and that Mrs. Sims was alive. Both also testified that defendant ambushed them in a nearby alley while they were on their way home, verbally confronted defendant about their prior altercation involving Mrs. Sims, and then shot Mr. Sims and shot at Mr. Dingle. Evidence also showed that defendant chased Mr. Dingle as he tried to run from the scene. Medics arrived to assist Mr. Sims at approximately 11:30 a.m. And, as noted, the bullets used to injure Mr. Sims and to kill Mrs. Sims came from the same weapon.

Again, to establish ineffective assistance of counsel, “ ‘[a] defendant must overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.’ ” *People v Buie*, 491 Mich 294, 311; 817 NW2d 33 (2012), quoting *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Again, in light of the evidence presented at trial, it was clearly sound trial strategy for counsel to use the alibi defense. The timeline of events was not the focus of the prosecution or the defense at trial, and defense counsel had three witnesses who testified that defendant was elsewhere when trial evidence showed the crime occurred. While counsel is required to make a reasonable investigation of the case, counsel easily could have concluded that the information Mr. Anderson provided to the police would not assist the defense. Rather, under the circumstances, it was a reasonable decision *not* to obtain testimony from Mr. Anderson, who was a child at the time of the crime, when the alibi defense made his input unnecessary. *Strickland*, 466 US at 690-691.

Indeed, had defense counsel elicited testimony from Mr. Anderson that he heard something occur earlier in the morning, or evidence that Mrs. Sims died earlier based on the EMT’s notation of lividity, it would have been reasonable to suppose that the evidence would be rebutted by other lay and expert testimony, as occurred during the evidentiary hearing. More importantly, however, had defense counsel relied on a theory that Mrs. Sims died earlier, defendant’s whereabouts were not accounted for before 10:00 a.m. Rather, defendant’s alibi took him away from the area between 10:00 a.m. and at least 1:00 or 2:00 p.m., which was

consistent with the trial evidence regarding when the crimes occurred. But even if he could also establish an alibi to cover an earlier time of death for Mrs. Sims, as the trial court clearly recognized, it would have been strategically *unsound* for counsel to rely on the theory specifically posed by counsel here in arguing the motion for relief from judgment: that (a) Mr. Sims killed his wife earlier that morning while she was walking up the stairs to the apartment, (b) Mr. Sims shot himself or had someone shoot him in the middle of his chest with the same weapon in an alley down the street, and (c) Mr. Sims then staged a chase down the street by Mr. Dingle and some other man holding a gun.

And, while defendant also makes the point that he does not have to offer a theory of what actually happened, but merely that counsel should have done more investigation to pinpoint the time of death, if evidence showed defendant was several miles away from the crime scene when trial evidence showed Mrs. Sims died, it was entirely logical for counsel, at trial and on appeal, to rely on that fact. Moreover, it is well-settled that “decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight.” *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). Here, no evidence suggests that counsels’ performance fell below an objective standard of reasonableness. Accordingly, defendant failed to show ineffective assistance of counsel and failed to show good cause for the trial court to grant his motion for relief from judgment.

#### IV. NEWLY DISCOVERED EVIDENCE

Defendant asserts that the trial court abused its discretion in denying his motion for relief from judgment because Mr. Ware’s recantation, in addition to Dr. Jentzen’s testimony regarding Mrs. Sims’s time of death, constituted newly discovered evidence entitling defendant to a new trial. We hold that the trial court did not abuse its discretion in denying defendant’s motion on this ground.

We initially observe that all of the documents and photographs on which defendant’s recent expert relied were available at the time of trial. Accordingly, Dr. Jentzen’s testimony supporting a theory that Mrs. Sims died before 10:00 a.m., does not constitute newly discovered evidence, but simply a new look at old evidence, which was, in almost every way, disputed by the prosecution’s expert on remand. With regard to Mr. Ware’s recantation of his trial testimony, the trial court is correct that, in Michigan, “ ‘where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy.’ ” *People v Patmore*, 264 Mich App 139, 153; 693 NW2d 385 (2004), quoting *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Indeed, this Court has ruled that a new trial is properly denied if a defendant fails to “clearly establish the veracity of the witness’s recanting testimony or the falsity of her trial testimony.” *Id.* In any case, it remains true that a new trial based on newly discovered evidence is only proper if, as discussed, the defendant shows “(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.” *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotations omitted), citing *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); MCR 6.508(D).

We hold that the trial court did not abuse its discretion in declining to grant defendant a new trial on the basis of Ware's recantation testimony. The trial judge was in the best position to assess his credibility and the court was not convinced of the veracity of Mr. Ware's recantation. Further, his testimony offered no explanation for why he may have lied when he gave very specific trial testimony identifying defendant and describing defendant's conduct in entering the Sims's apartment with a gun when the shooting occurred and running away immediately afterward. Indeed, he specifically testified on remand that he testified as he did in 1996 because he wanted to get a killer off the streets of his neighborhood which, far from suggesting he testified falsely at trial, strongly implies that his trial testimony was actually truthful. Moreover, while it was defendant's stated goal to establish doubt about when Mrs. Sims died, and to suggest that Mr. Sims killed her sometime before 10:00 a.m. and before he left the apartment, Mr. Ware did not change that crucial aspect of his testimony. He continued to state that the shooting occurred at approximately 11:45 a.m., that he saw a man enter the apartment house at that time, and that he heard gunshots right after that. Again, both Mr. Sims and Mr. Dingle specifically stated that defendant shot Mr. Sims and it is undisputed that the same gun was used in Mrs. Sims's murder. Even if the court found the recantation credible, that Mr. Ware now claims he does not know who actually entered the Sims's apartment at the time of the murder in no way rises to new evidence that "makes a different result probable on retrial." *Cress*, 468 Mich at 692. The trial court's ruling did not constitute an abuse of discretion.

For all the foregoing reasons, we affirm the trial court's ruling.

/s/ Henry William Saad  
/s/ David H. Sawyer  
/s/ Kathleen Jansen