STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2001
v	No. 219564 Wayne Circuit Court Criminal Division
ROBERT LEON WIGGINS, Defendant-Appellant.	LC No. 98-011384

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Robert Leon Wiggins of second-degree murder[1] and possession of a firearm during the commission of a felony[2] (felony-firearm) for shooting Jerome Evans to death. The trial court sentenced Wiggins to thirty-five to seventy years in prison for the second-degree murder conviction and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts

At dusk on September 25, 1998, nineteen-year-old Eileithyia Estell and her friend, Zenobia Craig, went to a house on Holden Street in Detroit.[3] When they arrived at the house, which was known because of the drugs sold there, the two women walked up to the porch where six or seven men, including Wiggins, were sitting. Estell had seen Wiggins before, but did not know him well. Soon after Estell and Craig arrived at the house, Craig and one of the men, "DJ," left in Craig's car. Estell, however, stayed and talked with one of the men, Francoise, whom she called "Frenchie."[4] Approximately five minutes later other people began to leave.

[1] MCL 750.317.

[2] MCL 750.227b.

[3] The women had been smoking marijuana, but according to Estell, her memory of the evening was intact.

[4] Frenchie was shot and killed a few months before trial.

Five to ten minutes after then, Estell heard a car pull up in front of the house next door and people begin to argue. Estell could not see what was going on, but she did hear gunshots, which prompted her to duck. When she looked up, Estell saw one man chasing and shooting at an unarmed man, Evans, across the street. Estell also saw Wiggins shooting at Evans from the side. At one point, Estell saw Wiggins with his arms extended and "fire" coming from the area of his hands. After the shots were fired, Evans fell in front of a gas station across the street from the house on Holden.

Estell ran from the scene, with Frenchie close behind her. Craig and DJ were driving by and stopped so Estell and Frenchie could get into Craig's car. As she got into Craig's car, Estell saw that Frenchie had a handgun, which she said he left in Craig's car before he went with DJ to DJ's house. Though Estell did not believe that Frenchie was involved in the shooting, she heard him say, "I can't believe that n***** shot that n***** with my gun." Craig recalled hearing Estell say "left him for dead" and Frenchie say "they killed that n***** with my gun" as they drove away from Holden Street, but she did not believe that Frenchie had put the gun in her car.

The medical examiner determined that Evans had been shot ten times, but not from close range, leaving wounds that were largely consistent with being shot while running. At least one of the wounds was consistent with being shot while Evans was on the ground with the shooter standing over him. The medical examiner recovered two different types of bullet from Evans' body, but could not determine whether there were two shooters. The police found thirteen shell casings at the scene. According to Detroit Police Department Detective David Beckwith, an evidence technician, the shell casings were from two different weapons. He thought that one gun was moving as it was fired and that the other gun could have been discharged as the shooter stood over the victim.

Five days after the shooting, the police arrested Wiggins and then interviewed Estell. At that time, she said, she was scared and did not tell the police everything she saw. In her first statement to the police, Estell said that a man in a light shirt shot Evans, but made no mention of a second shooter; Craig attempted to corroborate this single-shooter theory when she spoke with the police. When the police interviewed Estell a second time, she gave them an account of the shooting that implicated a second shooter. She did not identify Frenchie as one of the shooters when speaking with the police. After giving police this second statement, Estell picked Wiggins out of a lineup.

Several other witnesses were able to give information relevant to the shooting. According to Maxine Renee Davis, who lived on Holden Street with Wiggins, Wiggins said that he was going to leave, but had not left the house by the time Davis left around 7:45 p.m. Jerome Antonio Moore, who lived across the street, heard gunshots that sounded close to the house. The shots also sounded as if they were being fired from more than one gun. George Edward Moore, who was one block away from the house on Holden Street on the night of the shooting, heard five to six shots. Like Jerome Moore, he said that the shots sounded as if they were fired from more than one gun. He added that the shots also sounded as if they were fired while the shooter or shooters were running.

Brian Bruce Brockington was about a block and a half from the scene of the shooting when he heard gunshots. He heard several shots and was of the opinion that they were fired from more than one gun. When the shots stopped, he left his house and went to the scene. He saw the body of the victim on the ground. While at the scene, a friend approached him and told him that Frenchie and "Rob" shot the victim. Carlos Byrd was with Brockington when he heard eight to ten gunshots. He agreed that the shots sounded as if they were fired from more than one gun. After the shots stopped, he ran to the scene because his girlfriend lived nearby. As he approached, he saw the victim on the ground, whom he identified as "Pumpkin."

Despite this evidence tying Wiggins to the shooting, Jana Hines, the mother of Wiggins' three children, gave Wiggins an alibi. She said that Wiggins called her around 7:00 p.m. on the day of the shooting, she picked him and Ardell White[5] up at a store near his house, they went to eat, and returned to her house by 8:00 p.m. Jana Hines said that she wanted to pick defendant up because she wanted him to be "out on the street" for his birthday, which was a few days away. She explained that "usually he ends up getting locked up or something." Ruby Hines, her mother, confirmed that Wiggins called her daughter to pick him up and that her daughter left to do this before 7:00 p.m. Ruby Hines said that her daughter and Wiggins returned to the house around 8:00 p.m., and stayed there the rest of the evening. Tamika Shirlee also said that she observed Jana Hines leave her house at around 7:00 p.m. to pick up Wiggins and "PeeWee" and to get some food. Jana Hines used Shirlee's van and returned home between 7:45 p.m. and 8:30 p.m. LaTasha Hines, Jana Hines' sister, saw Wiggins, "PeeWee," and "Steve" at the Hines home at 8:30 p.m. on the night in question.

II. Voir Dire

A. Standard Of Review

First, Wiggins claims that he is entitled to a new trial because the trial court tainted the jury during voir dire by revealing that Wiggins was an habitual offender. Wiggins did not object to the trial court's comments during voir dire. Thus, we review this issue for plain error affecting his substantial rights.[6]

B. Wiggins' Status As A Habitual Offender

At the beginning of voir dire, the trial court read the information to the venire, revealing to the prospective jurors that the prosecutor had charged Wiggins with first-degree premeditated murder and felony firearm. The trial court then stated:

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[5] The other suspect in the murder.

[6] See *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

> And the third offense here, or the enhanced offense under our Habitual Offender, Fourth Offense, and under that statute it means that he has some prior convictions.
>
> Like I said, this is just a piece of paper. It is not evidence.

We agree with Wiggins that there was no legitimate reason for the trial court to inform the individuals who were to sit in judgment of him of this information in this context. A defendant's habitual offender status is not a jury question.[7] Further, an habitual offender allegation in a criminal information does not constitute a separate crime; the habitual offender allegation is merely "meant to place both defendant and the court on notice that sentencing procedures must include special consideration of prior convictions."[8] Thus, this was plain error.

Nevertheless, the trial court also informed the venire that this was not evidence, cushioning any prejudicial impact this statement had. Additionally, regardless of the trial court's error, defense counsel made a strategic decision to inform the venire of defendant's prior convictions during voir dire and Jana Hines also referred to his past entanglements with the law. Wiggins cannot claim that it was error requiring reversal for the trial court to reveal to the prospective jurors what his own counsel deemed appropriate to reveal.[9] Thus, this error does not require reversal.

III. Prosecutorial Misconduct

A. Standard Of Review

Wiggins next contends that the prosecutor's arguments to the jury in closing denied him a fair trial. He failed to object to the comments at issue. Again, our review is for plain error affecting his substantial rights.[10]

B. Vouching

Wiggins first contends that the prosecutor inappropriately vouched for Estell's credibility by arguing to the jury that she, the prosecutor, did not believe LaTasha Hines' testimony giving Wiggins an alibi:

> So then what we have is the other young lady who testified, the sixteen year old, I think it was Jana's sister, and she reminds me of being in an Easter pageant, someone who's nervous getting ready to go on stage. And they stand up

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[7] *People v Morales*, 240 Mich 571, 583; 618 NW2d 10 (2000).

[8] *People v Martin*, 209 Mich App 362, 364; 531 NW2d 755 (1995).

[9] See *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

[10] See *Carines*, *supra*.

there and they say their lines all rehearsed, you know Christmas Day Jesus was born, and then he died and rose again, whatever the lines are.

But you will remember what she did. She sat in that chair and she does not tell us her name. She didn't tell us anything. She started testifying. And I had to say to her, hold on, hold on. There are no questions in front of you. And that's when the Judge told her to wait for the questions first. She just started telling us her description. And isn't it interesting that they all rode together. Isn't it interesting that they all said the same thing.

Well, maybe because it's the truth, ladies and gentlemen. And that is for you to decide. *I do not believe it is the truth.* It just doesn't make sense that that lady would pick up both suspects in a murder but wants you to believe that it was an hour before the killing. Because for you to believe that it was an hour before the killing, that means that everything that Ms. Estell said and everything that Maxine Davis said is a lie.

And for you to believe this alibi, meaning that everything that those ladies said is a lie. Because Ms. Estell said that what she saw is exactly what the police officers found.[11]

A prosecutor may not vouch for the credibility of a witness by implying that the prosecutor has special knowledge concerning whether the witness is testifying truthfully.[12] However, we examine allegations of prosecutorial misconduct individually and in context, keeping in mind that a prosecutor is "free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case."[13] This freedom to argue includes the ability to argue that a particular witness should not be believed.[14]

In this instance, the prosecutor walked a fine line by phrasing her criticism of LaTasha Hines in the first person. However, substantively, she did not imply to the jury that she knew of some special, secret reason why Estell should be believed while LaTasha Hines' testimony discredited. To the contrary, the prosecutor was arguing that the jury should not believe LaTasha Hines because she appeared to have rehearsed her testimony. Moreover, the prosecutor contended that LaTasha Hines' testimony was incredible because she began speaking immediately after she took the stand, before a question had been asked of her, and because her testimony matched perfectly with her mother's and sister's alibi testimony. Further, the prosecutor stressed to the jury that it was for the jury to decide whether LaTasha Hines was

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[11] Emphasis added.

[12] *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

[13] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[14] *People v Launsberry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

credible. Thus, we are confident that the specific words the prosecutor used did not constitute misconduct because she was arguing directly from the evidence adduced at trial.

Wiggins also claims that the prosecutor again improperly vouched for Estell's credibility by arguing:

> I don't doubt that Jana probably picked them [Wiggins and Ardell] up, and I don't doubt that she picked them up from this store. I just don't think it was at seven. I think it was closer to 8:30, 8:20, as long as it took him [Wiggins] to fire that – fire those bullets and run and make a phone call and say come and get us because it is just interesting that it is those two people and it is interesting that they spent the night at her house.
>
> Of course, it may not be unusual for Mr. Wiggins to spend the night at the house with the mother of his children. But it is interesting when you say that he and Ardell White are suspects in the murder that happened across the street from where he lives.
>
> And what about Ms. Estell's testimony that makes her a liar?
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> *I believe that she didn't tell everything that she knew the first time.* But everything that she said in the first statement she also said in the second statement. She added more information because I asked her, and she said because I think it is important. And the prosecutor – our whole job is to bring all the evidence here for you to analyze and choose which witnesses you may believe.[15]

Again, the prosecutor's decision to phrase her argument in the first person could give the misimpression that she was vouching for Estell's credibility. However, quite clearly in this instance, the prosecutor was arguing to the jury that Estell's initial decision to withhold evidence from the police should not be viewed as an indicator that she gave untruthful testimony. To make this point, the prosecutor noted how Estell's second statement to the police supplemented but did not change the information she originally gave to the police. This was proper argument.

Wiggins takes two other comments the prosecutor made out of context to argue that she vouched for Estell's credibility. At one point during closing arguments the prosecutor suggested to the jury that defense counsel would attempt to make Estell "seem like a Ms. Liar Face. But she is not." As with each other alleged instance of vouching, the prosecutor went on to explain that the jury should not conclude that Estell was lying just because her testimony differed from other trial testimony. At the close of her rebuttal, the prosecutor informed the jury that "all I am asking you to do, ladies and gentlemen, is think about the facts. Was she [Estell] lying? I don't think so. Did Mr. Robert Wiggins shoot that man in cold blood? Yes, he did. Yes, he did." This statement arose at the end of yet another long argument on the evidence that came out at

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[15] Emphasis added.

trial. While the statement is a conclusion, it did not imply to the jury that the prosecutor was able to conclude from any source other than the evidence adduced at trial that Wiggins was guilty and Estell was credible. This was not misconduct.

C. Disparaging Defense Counsel

Wiggins also claims that the prosecutor committed misconduct by disparaging his trial counsel in front of the jury by stating:

> And the prosecutor – our whole job is to bring all the evidence here for you to analyze and choose which witnesses you may believe.
>
> It is different than defense attorney. He is depending on somebody. We have to represent the People of the State of Michigan. So we have to bring out good or bad. Because we are representing the People of the State of Michigan. So you have to deal with what you have.

He also claims that the prosecutor denigrated his defense counsel by stating that "[defense counsel] tried to ask to some questions which were misleading and I objected," and by saying that defense counsel intended to characterize Estell as "Ms. Liar Face."

"A prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence."[16] This sort of argument can "'impermissibly [shift] the jury's focus from the evidence itself to defense counsel's personality.'"[17] Critically, however, Wiggins does not explain how the prosecutor's statements tended to cast his trial counsel in a bad light.

The prosecutor's statement concerning her burden of producing all the evidence relevant in the case in contrast with a defendant's right not to produce any evidence was accurate. It explained why the prosecutor presented Estell as a witness even though Estell made two different statements to the police. This argument was intended to bolster faith in the quality of the evidence in the prosecutor's case, not to denigrate the defense. As for the comment concerning the prosecutor's objection to misleading defense questions, this was factually accurate, though not particularly relevant to any fact at issue at trial. The trial court eliminated any potential prejudice from the comment by instructing the jury that the attorneys' arguments and its own rulings did not constitute evidence in the case. With respect to the "Ms. Liar Face" comment, the stated theory of the defense was that the prosecutor's witnesses were not credible. While this was, perhaps, not the most sophisticated way to challenge that defense theory, there was nothing denigrating to defense counsel in the way the prosecutor contended that Estell was to be believed,

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[16] *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 364 (1996).

[17] *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), quoting *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).

despite how defense counsel might choose to characterize her. In short, none of these other arguments constituted prosecutorial misconduct.

IV. Jury Instructions

A. Standard Of Review

Wiggins argues that the trial court gave an erroneous reasonable doubt instruction and that it also coerced the jury into rendering a guilty verdict with additional instructions during deliberations. His arguments implicate questions of law, ordinarily meriting review de novo.[18] However, he failed to preserve these issues for appeal by objecting to the instructions in the trial court.[19] Thus, we review this issue for plain error affecting his substantial rights.[20]

B. Burden Of Proof

At the close of trial, the trial court read to the jury CJI2d 3.2 concerning the prosecutor's obligation to prove the charges beyond a reasonable doubt. Wiggins claims that this instruction was inadequate because it lacked language requiring the jury to find "proof of guilt to a moral certainty" and failed to define reasonable doubt as a doubt that would cause a "juror to hesitate in making an important decision in life." He does not claim that CJI2d 3.2 is defective in any other respect.

Most recently, in *People v Snider*,[21] this Court flatly rejected the defendant's contention that CJI2d was flawed because it lacked this moral certainty language. In fact, this is an issue that is well-settled.[22] Though the "hesitate to act" wording is one way that a reasonable doubt can be expressed, CJI2d 3.2(3) does an adequate job in defining this concept in the context of the jury's role as factfinder:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that – a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.

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[18] See *People v Bartlett*, 231 Mich App 139, 143; 584 NW2d 341 (1998).

[19] See *People v Smith*, 80 Mich App 106, 113; 263 NW2d 306 (1977).

[20] See *Carines*, *supra*.

[21] *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000).

[22] See *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991); *People v Jackson*, 167 Mich App 388, 390-391; 421 NW2d 697 (1988).

Actually, this standard instruction conveys the seriousness inherent in proof beyond a reasonable doubt in more concrete terms than the "hesitate to act" wording Wiggins now suggests was more appropriate. Thus, this omission of this language did not constitute plain error requiring reversal.

Wiggins also asserts that the trial court undermined the prosecutor's burden of proof beyond a reasonable doubt when it asked the jurors to "give the facts and the reasons on which you base it" after the jury indicated that it was deadlocked. This instruction came from CJI2d 3.12(3). If Wiggins intends to suggest that he was prejudiced because one or more jurors supporting acquittal acquiesced to the jurors supporting conviction solely because the jurors favoring acquittal could not articulate their reservations, he fails to say so explicitly. In fact, he gives no real discussion of this assertion, essentially abandoning this issue on appeal.[23]

In any event, though we discuss the standards for deadlocked juries in more detail below, we note that "[t]he optimal instruction [for a deadlocked jury] will generate discussion directed towards the resolution of the case but will avoid forcing a decision."[24] The trial court's urging that the jurors attempt to express their points of views in detail was aimed at just this end. This instruction did not suggest that the jurors, whether they supported affirming or convicting Wiggins, ignore the fact that it was the prosecutor's legal obligation to convince them that there was sufficient proof to convict. The substance of this instruction did not affect the burden of proof in this case and, therefore, was not plain error requiring reversal.

C. Deadlocked Jury Charge

Voir dire began on February 17, 1999. After the trial court empanelled the jury, but before opening statements, it excused the jurors for a lunch break, remarking:

> I know it is a great inconvenience for all of you to be here. And I know that I am taking you away from your house as well [as] away from your jobs and your loved ones.
>
> It is my understanding that *this case will probably only last a couple of days*. And as I said before I appreciate the fact that all of you are here to do your civic duty and spend a *couple of days* with us.
>
> At the *end of a few days*, if you need notes for your employers, we will give you notes for your employers and we will let your employers know that you have been down here with us.[25]

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[23] See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[24] *Sullivan*, *supra* at 334.

[25] Emphasis added.

The trial actually lasted more than "a couple of days." Though there was testimony on only three days, closing arguments and instructions added an additional day. Not until February 23, 1999, the jury's fourth day of service, did the jury begin to deliberate. The jury deliberated approximately four hours that day. The next morning, the jury asked to be re-instructed on first-degree murder, second-degree murder, and aiding and abetting. Though the trial court obliged, the jury believed that it could not reach a verdict. So, later the same day, the jury sent a note to the trial court revealing the number of jurors willing to convict or acquit on each charge. In response, the trial court called the parties, attorneys, and jury to the courtroom. The trial court prefaced its deadlocked jury instruction by stating:

> As I told you in my prior instructions, I really don't want to know what your status is nor do I want to know how your voting stands.
>
> *So until you have reached a decision, you have reached a verdict, that's when I want to hear from you.*
>
> I am going to read you an instruction at this point in time that might be able to give you some assistance. And after I am done with this instruction, I'm going to ask that you go back into the jury room and continue with your deliberations.
>
> I guess from this note you have indicated that, no, you cannot reach a verdict.[26]

The trial court then began reading the substance of CJI2d 3.12:

> I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.
>
> Remember it is your duty to consult with your fellow jurors and try to reach agreement if you can do so without violating your own judgment. To return a verdict you must all agree and the verdict must represent the judgment of each of you.
>
> As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.
>
> Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

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[26] Emphasis added.

> When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it is wrong.
>
> However, none of you should give up your beliefs about the weight or effect of the evidence only because of what your fellow jurors think of only for of the sake of reaching agreement.

CJI2d 3.12 ended at this point, but the trial court added:

> I should tell you that each juror is different. Sometimes it takes five minutes to reach an agreement. Sometimes it takes five hours. Sometimes it takes five days. Sometimes it takes five weeks.
>
> I am going to ask that you go back and continue with your deliberations.

By the end of this fifth day of service, having spent between four and five additional hours[27] deliberating, the jury reached a verdict, convicting Wiggins.

Wiggins now argues that the trial court's promises of a quick trial, added to the admonition that it did not want to hear from the jury unless it was returning a verdict and its observations concerning the length of time it takes some juries to reach a verdict, coerced the jury to convict him. In other words, he suggests that the trial court created an expectation that the jurors would have only a brief term of service on the jury, but then warned the jury that it would not be able to leave until it rendered a verdict, and then threatened to keep it up to five weeks if there were no verdict. Wiggins also claims that this deadlocked jury instruction was defective because it failed to reiterate the reasonable doubt standard.

This is a well-constructed argument, and we address Wiggins' coercion argument first. As Wiggins notes, our Supreme Court in *People v Sullivan*,[28] adopted standard 5.4 of the American Bar Association's Project on Minimum Standards for Criminal Justice. Standard 5.4, quoted in *Sullivan*, states:

> "Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the Court may give an instruction which informs the jury:

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[27] The transcript indicates that the trial court convened the parties, attorneys, and jury to issue the deadlocked jury instruction at 11:05 a.m. on February 24, 1999. Though the transcript does not indicate at what time this proceeding ended, the transcript consists of only nine pages, suggesting that it took only a few minutes to complete these supplemental instructions. The transcript then notes that a substitute court reporter took the jury's verdict at 4:00 p.m. that same day.

[28] *People v Sullivan*, 392 Mich 324, 341; 220 NW2d 441 (1974).

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). *The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.*

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement."[29]

However, *Sullivan* and subsequent case law makes clear that each instance of alleged coercion must be evaluated in light of the particular facts of the case and that not every departure from these guidelines merits reversal.[30] Rather, "[t]he instruction that departs from ABA standard 5.4 must also have an undue tendency of coercion – e.g., could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement?"[31]

The answer to that core question in this case is no. Having read the context in which the trial court informed the jurors that it did not want to "hear" from them until they reached a verdict, it is clear that the trial court was conveying that it did not want to know how many jurors would vote in favor of convicting Wiggins and how many jurors supported acquitting him. Apparently, the trial court only made this statement because the jury's note indicated how many jurors favored convicting or acquitting on each charge in order to illustrate the deadlock. Only by divorcing the statement from the "facts and circumstances" of the case, which is something

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[29] *Id*. at 335 (emphasis added).

[30] See *id*. at 331-332, 342; see also *People v Hardin*, 421 Mich 296, 313; 365 NW2d 101 (1984).

[31] *Hardin, supra* at 314.

we may not do, could we conclude that the jurors had the impression that they were being forced to reach a verdict at all when the trial court responded in this way to their note.[32] Had the trial court not cut off this sort of nonessential communication on the standing of the votes for or against conviction, the trial court might have risked coercing certain jurors to change their votes simply to reach a verdict by focusing its attention on the holdouts.[33] This was a proper, noncoercive response to the deadlock.

As for the trial court's commentary on the amount of time it may take jurors to agree on a verdict, we cannot agree that this statement had a coercive effect. The instruction the trial court read to the jury was CJI2d 3.12, which is almost verbatim the instruction encouraged in Standard 5.4. The trial court merely added additional commentary without changing the substance of this proper instruction. More importantly, the first thing the trial court said to the jurors after it finished reading the standard instruction was that "each juror is different." The trial court was attempting to give the jurors some perspective on the deliberative process, letting the jurors know that they should not take their early disagreements as a sign that they would never agree. We cannot discern how this statement is susceptible to any other interpretation. Nothing in the words the trial court spoke to the jurors intimated that they had to deliberate for any specific length of time, return a verdict in a certain amount of time, or even had to return a unanimous verdict contrary to their honest beliefs.[34] Rather, the trial court said that the length of deliberation varies. The comment did not imply that there would be any reprisals of any sort under any

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[32] *Sullivan, supra* at 332.

[33] See, generally, *People v Wilson*, 390 Mich 689, 692; 213 NW2d 193 (1973) ("Whenever the question of numerical division of a jury is asked from the bench, in the context of an inquiry into the progress of deliberation, it carries the improper suggestion that the state of numerical division reflects the stage of the deliberations. It has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority."); see also *People v Echavarria*, 233 Mich App 356; 592 NW2d 737 (1999); *People v Booker*, 208 Mich App 163, 169; 527 NW2d 42 (1994).

[34] See *People v Cadle*, 204 Mich App 646, 657-658; 516 NW2d 520 (1994), overruled on other grounds in *People v Perry*, 460 Mich 55, ; 594 NW2d 477 (1999) (requiring jury to deliberate relatively late into the evening was improper, but not so "unreasonable" that it was coercive); *People v Vettese*, 195 Mich App 235, 244-245; 489 NW2d 514 (1992) (instruction that jury would be excused for the evening and would return the next morning not coercive because it did not imply that jury had to return verdict by certain time); *People v Cook*, 130 Mich App 203, 206; 342 NW2d 628 (1983) (trial court's comment that it would send deadlocked jury home for the evening and have them return the next day to continue deliberations not coercive).

circumstances, much less if the jury failed to arrive at a verdict.[35] Nor did the comment intimate that the jurors would be failures if they did not get past the deadlock.[36]

Though Wiggins concedes that the jury had not been deliberating very long when it sent the note informing the trial court that it was deadlocked, he fails to point out that the jury took between four and five additional hours to deliberate before rendering the verdict. In the absence of any noticeably coercive language in the instruction, the length of this additional deliberation suggests that if the trial court's remarks had even a subtly coercive tone to them, it had no effect on the jury.[37] It is also notable that the trial court instructed the jurors that they were not under any obligation to stray from their honest beliefs about the facts of the case simply to reach an agreement before making this statement.[38] The jury evidently was able to take this instruction to heart.

Further, from the outset, the trial court did not promise the jurors how long the trial would take. The trial court merely gave its best estimation of the length of the trial. In reality, that estimation was not so very far off the mark. Consequently, even when we examine the allegedly coercive instructions and comments in light of this supposed expectation of the duration of the trial, we are not persuaded that the jury verdict was coerced.

With regard to Wiggins' argument that this deadlocked jury instruction was deficient because it did not repeat the reasonable doubt instruction, we do not agree that this was error. Wiggins cites authority from the United States Court of Appeals for the First Circuit for the proposition that trial courts instructing a deadlocked jury *should* reinstruct the jury on reasonable doubt.[39] This foreign case law does not mandate automatic reversal in the absence of this instruction. The Michigan Supreme Court has also considered the relationship between coercive instructions and jury verdicts on a number of occasions in a particularly comprehensive manner,

[35] See *People v Strzempkowski*, 211 Mich 266, 267-268; 178 NW 771 (1920) (trial court threatened to discharge jury if it did not reach a verdict soon).

[36] *People v Goldsmith*, 411 Mich 555, 309 NW2d 182 (1981) (implying that it was jurors' civic duty to return a unanimous verdict or they would fail was coercive); *People v Harman*, 98 Mich App 541, 543; 296 NW2d 303 (1980), rev'd on relevant grounds 411 Mich 1083 (1981) (trial court instructed jury "that when a jury is unable to reach a verdict, the jury fails to accomplish its purpose. A jury unable to agree is, therefore, a jury which has failed in its purpose. Each time we have such an indecisive jury, ammunition is given to those who oppose the jury system as we know it, a system which requires a unanimous vote for either a conviction or an acquittal. Please bear this in mind.").

[37] See *People v Bookout*, 111 Mich App 399, 403; 314 NW2d 637 (1981).

[38] See *People v Daniels*, 142 Mich App 96, 97-98; 368 NW2d 904 (1985) (instruction that urged full deliberation but did not require jurors to give up independent beliefs was not coercive).

[39] See *United States v Paniagua-Ramos*, 135 F3d 193, 197 (CA 1, 1998), quoting *United States v Manning*, 79 F3d 212, 222 (CA 1, 1996); *United States v Angiulo*, 485 F2d 37, 39 (CA 1, 1973).

and yet has not adopted the First Circuit's approach to deadlocked jury instructions.[40] We acknowledge that this Court, in *People v Lawson*,[41] stated that "[o]ther charges of doubtful validity have been saved . . . because the court reinstructed [the jury] upon the burden of proof." However, the instruction in this case was not "of doubtful validity" and *Lawson* does not suggest to any extent that reinstructing a deadlocked jury on the burden of proof is mandatory. Thus, Wiggins is not entitled to relief because of the trial court's comments and instructions to the jury when it found out that the jury believed that it was deadlocked.

V. Effective Assistance Of Counsel

A. Standard Of Review

Wiggins claims that his trial counsel's performance denied him his constitutional right to the effective assistance of counsel.[42] We review constitutional questions de novo,[43] a standard that is particularly relevant in this case because the legal test we apply to ineffective assistance of counsel issues does not requires us to defer to the trial court to any extent.

B. Legal Test

As this Court explained in *People v Knapp*,[44]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

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[40] See *Hardin*, *supra*; *Goldsmith*, *supra*; *Sullivan*, *supra*.

[41] *People v Lawson*, 56 Mich App 100, 109; 223 NW2d 716 (1974).

[42] US Const, Am VI; Const 1963, art 1, § 20.

[43] See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

[44] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

C. Patently Meritless Claims

Of the four omissions by his trial counsel that Wiggins claims constituted ineffective assistance of counsel warranting a new trial, three are patently meritless. We accord these arguments the exact consideration they deserve.

First, Wiggins claims that his attorney should have objected or sought a mistrial when the trial court informed the venire that he was an habitual offender. We agree that the trial court committed error in this regard, making the trial court's remarks ripe for an objection or motion for a mistrial. However, the trial court's own statement informed the prospective jurors that Wiggins' prior convictions related in the criminal information did not constitute evidence in this case. His counsel strategically raised this issue early in the trial, evidently to lessen the effect it might have on the jury. This evidence also paled in comparison to the eyewitness testimony tying Wiggins to the shooting. Thus, there is no evidence that this aspect of Wiggins' trial attorney's conduct, though deficient in this regard, was so prejudicial it denied him a fair trial.

Second, Wiggins claims that his trial attorney was ineffective for failing to object to the trial court's reasonable doubt and deadlocked jury instructions and to request an additional instruction to cure the coercive effect those instructions had on the jury. As the foregoing analysis indicates, the instructions were not coercive. Defense counsel cannot be considered ineffective for failing to raise a meritless issue at trial.[45]

Third, Wiggins argues that his trial attorney was ineffective for failing to object to the multiple instances of prosecutorial misconduct in this case. However, as with the deadlocked jury instruction, his attorney had no legitimate ground on which to object to the prosecutor's arguments because they had a significant and proper basis in the evidence introduced at trial. Defense counsel's failure to object in these instances was not deficient, much less prejudicial.

D. Prearraignment Delay

Wiggins' more serious claim of ineffective assistance of counsel concerns his trial counsel's failure to move to suppress the evidence gathered following the lineup in which Estell identified him.[46] Specifically, he contends that the delay between his arrest and his arraignment, during which time this lineup occurred, proved that the police lacked probable cause to arrest him. Wiggins argues that his trial counsel's performance was deficient because his attorney failed to recognize that evidence gathered as a product of an illegal arrest is grounds for suppression of that evidence and failed to move to suppress this evidence. Further, Wiggins claims that he suffered prejudice because, without this evidence, Estell's in-court identification of him would have been much weaker.

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[45] See *Snider*, *supra* at 425.

[46] Wiggins does not identify what this evidence was. We presume that it was the identification itself.

To understand this issue requires knowing the timeline of events in this case. Evans was shot to death on September 25, 1998. The police arrested Wiggins for committing this crime around noon on September 30, 1998. The police also questioned Estell on September 30, 1998, but a number of hours after they had arrested Wiggins. The police did not have Estell identify Wiggins in a corporeal lineup until approximately 9:50 p.m. on October 2, 1998, about fifty-eight hours after the police arrested him. There is debate in the record concerning when, precisely, Wiggins' arraignment occurred. The entry on the trial court record jacket states that it occurred on October 5, 1998. The prosecutor, at the *Ginther* hearing was willing to stipulate that the arraignment took place some time between October 3, 1998, and October 5, 1998, but noted that other documents suggested that the arraignment took place on October 4, 1998. In any event, it is clear that (1) as many as five days, approximately 120 hours, elapsed between Wiggins' arrest and when he was taken to a magistrate to be arraigned and (2) the prosecutor has never stated that an emergency or extraordinary circumstances caused or justified this delay. Plainly, this delay was contrary to the United States Supreme Court's holding in *Riverside Co v McLaughlin*[47] that a suspect arrested without a warrant must be arraigned within a reasonable time and no more than forty-eight hours after arrest unless there is an emergency or extraordinary circumstance justifying the delay.

Wiggins' trial counsel first explained his failure to move to suppress the lineup evidence because he was considering "other issues" at the time. On cross-examination by the prosecutor, Wiggins' trial counsel elaborated:

> Because as I just stated to the [appellate] defense attorney, there were two, two people who made statements. And then to find a person by the name of Ron, who was there at the scene. And with that *the police would have been able to introduce the reason why it wasn't a delay, or anything, they would say there were investigating, and things of that nature*, which I did discuss with Mr. Wiggins. Thus I did not move to suppress, or have the lineup suppressed.[48]

We can understand that the number of tasks at hand may have justified Wiggins' trial counsel's failure to move to suppress the lineup evidence immediately following his appointment to represent Wiggins. A reasonable attorney in the same position would have also been occupied with finding other possible suspects and witnesses. However, like Wiggins, we are troubled that his trial counsel, even at the *Ginther* hearing, did not understand that this was arguably an unconstitutional delay before arraignment under *Riverside's* forty-eight-hour rule.[49] Nor did Wiggins's trial counsel understand that, unlike in the context of a prearrest delay,[50] further

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[47] *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991).

[48] Emphasis added.

[49] See *Riverside*, *supra*.

[50] See *People v Cain*, 238 Mich App 95, 110-111; 605 NW2d 28 (1999).

investigation does not justify delaying an arraignment.[51] The police simply may not arrest a suspect and delay the arraignment in order to gather additional evidence to support the arrest;[52] probable cause must exist at the time of arrest in order for the arrest to be constitutional.[53]

Nevertheless, we cannot say with any assurance that Wiggins' trial counsel had grounds to move to suppress this evidence. Wiggins had an evidentiary hearing at which he was afforded the opportunity to develop a record to support his claim that he was denied effective assistance of counsel. Yet, Wiggins did not call the arresting officers to testify to the facts they claimed supported their decision to arrest Wiggins without a warrant. Rather, his trial counsel was the only witness. The questions Wiggins' appellate attorney asked concerned Wiggins' trial counsel's understanding of the length of the prearraignment delay in this case, whether the trial attorney knew in the abstract that evidence seized as a product of an illegal arrest could be suppressed, and why the trial attorney did not suppress the lineup evidence. Wiggins' appellate attorney did not develop a record concerning the grounds for the arrest in this case or the reasons for the delay.

Nor can we determine those grounds for Wiggins' arrest from other materials in the record. Though the trial court record also includes a transcript of the preliminary examination, the prosecutor relied solely on Estell to provide a factual basis for the charges at that hearing. Estell testified that she did not speak with the police until September 30 – after the police arrested Wiggins. This does nothing to explain whether the police had probable cause when arresting Wiggins. The trial testimony, though more extensive, is no more illuminating when it comes to determining how the police came to suspect that Wiggins shot Evans and whether that suspicion would be sufficient to constitute probable cause.

In short, the record in this case leaves an unbridgeable gap when it comes to determining whether, as a factual matter, Wiggins' trial counsel should have move to suppress the lineup evidence because it resulted from an illegal arrest. Moreover, Wiggins does not contend – or does not do so in a way that is clear to us – that his trial counsel should have moved to suppress the lineup evidence because the prearraignment delay made this evidence subject to a rule of automatic exclusion.[54] This gap in the record no more permits us to conclude that Wiggins'

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[51] See *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995).

[52] Unfortunately, there are longstanding allegations that this sort of prearraignment delay is all too common with the Detroit Police Department. See Norman Sinclair and Ronald J. Hansen, *Detroit police inquiry expands: Justice Department focuses on detainees' coerced confessions* (visited May 3, 2001) <http://detnews.com/2001/metro/0104/16/a01-212828.htm>.

[53] See *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991); see also US Const, Am IV; Const 1963, art 1, § 11.

[54] Given this Court's "totality of the circumstances" approach to confessions made during this unconstitutional prearraignment delay, we think it unlikely that such an argument would have merit. See *People v Manning*, 243 Mich App 615, 644; 624 NW2d 746 (2000).

arrest was unlawful than it would allow us to conclude that the arrest was lawful. Thus, Wiggins has not supported his burden of proving that his trial counsel's performance fell below an objective standard of reasonableness when he failed to move to suppress the lineup evidence.

Even assuming that Wiggins' trial counsel was ineffective for failing to move to suppress the lineup evidence, Wiggins has not sustained his burden of proving prejudice.[55] Estell identified him in court as the person who shot Evans. He does not challenge the admissibility of this in-court identification, only claiming that it would be less believable without the evidence that Estell also identified him in a lineup. Whatever advantage Wiggins would have gained from suppressing the lineup identification was not so significant that we can say he suffered prejudice and had an unfair trial because this evidence went to the jury. Estell was familiar with Wiggins before the shooting, which lent credence to her in-court identification. Other witnesses were also able to place Wiggins at the scene of the crime just before the shooting. Thus, even if Wiggins' trial counsel had moved successfully to have this evidence suppressed, it would have made no difference in this trial.

VI. Cumulative Error

Finally, Wiggins contends that even if each of these errors would not, individually, require this Court to reverse and remand for a new trial, their cumulative effect requires this result. Only the issues Wiggins raises with respect to the trial court's decision to reveal his habitual offender status and related failure by his trial counsel to object to this revelation have any merit in the sense that they constituted some form of error. Nevertheless, we concluded that the trial court's error was harmless and that even though Wiggins' trial counsel should have objected to this revelation, the failure to do so was not prejudicial. There should be no doubt that Wiggins's trial had some imperfections. However, he "is entitled only to a fair trial, not a perfect trial."[56] He received a fair trial and, thus, is not entitled to a new trial on this basis.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck

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[55] See, generally, *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000) (defendant has the burden of proving ineffective assistance).

[56] See *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998).