

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON DAVIS,

Defendant-Appellant.

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UNPUBLISHED

March 4, 2004

No. 243809

Wayne Circuit Court

LC No. 02-001169

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> He was sentenced to a prison term of 15 to 25 years for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant was accused of a shooting death occurring on June 22, 1982, at approximately 6:00 a.m. Witnesses testified that the defendant visited the victim's home to pick up prescription pills, which the victim sold from his home. One witness testified that defendant was essentially a "doorman" for the victim's illegal prescription drug business.

Another witness, who lived across the street from the victim, testified that on June 21, 1982, she saw defendant at the victim's house. She stated that on June 22, 1982, at approximately 5:55 a.m., she was awake and sitting beside her daughter's bed, which was "right under the window," when she heard a gunshot. Within seconds, she stated, she heard glass breaking and saw the victim falling out of an upstairs window. She also saw defendant leaning out of the window and shooting at the victim. She could see a side view of defendant's face, and his arm, as he leaned out of the window. She stated that she observed defendant leave the victim's house and walk down the street.

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<sup>1</sup> Defendant was acquitted of first-degree premeditated murder, MCL 750.316. (See Appendix B.)

After the victim fell out of the window, he got up, ran past two or three houses, and eventually pounded on a neighbor's door for help. No one responded, and the victim died in the neighbor's driveway. Defendant was not found until 2001.

Defendant first claims that he was denied his due process rights when the trial court admitted an in-court identification because it was tainted by impermissibly suggestive pretrial procedures. As support for this claim, defendant asserts that after the witness selected a different person from a photo array, an officer showed her defendant's driver's license from which she identified him as the shooter.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

Photographic identification procedures violate a defendant's due process rights if they are so impermissibly suggestive as to give rise to a substantial likelihood that there will be a misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An improper suggestion may arise when a witness is shown only one person or a group in which one person is singled out in some way. *Id.* But even if the pretrial identification procedure could be considered unduly suggestive and impermissibly tainted, an in-court identification is still appropriate where there is an independent basis for the in-court identification, untainted by the suggestive pretrial identification procedure. *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). To determine whether an independent basis exists, the following factors are considered: (1) the witness's prior knowledge of the defendant; (2) the witness's opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness's level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Id.*

After reviewing the record, we are satisfied that the trial court did not commit clear error in finding that the relevant factors predominated in favor of an independent basis for the witness' in-court identification. Testimony clearly indicated that the witness was familiar with defendant before the day in question. The witness stated she had seen defendant on at least fifty occasions before the homicide. The witness observed defendant during the crime and recognized him with certainty. Further, the trial court found that defendant's facial hair and hairstyle were significantly different on his driver's license and his photo in the array, which could explain why the witness did not initially recognize defendant when viewing the photo array. Moreover, the witness maintained that her identification of defendant at the 2002 preliminary examination was based on having actually seen him in 1982, and not on any photos. Thus, we find that reversal is not warranted.

Defendant next argues that the trial court's admission of the preliminary examination testimony of Sirriana, an unavailable witness, under MRE 804(b)(1), violated his rights guaranteed by the confrontation clause of the federal and state constitutions. We disagree.

Because defendant did not object to the testimony below on the basis he now raises on appeal, MRE 103(d), this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MRE 804(b)(1) allows the admission of former testimony if a witness is unavailable. MRE 804(a)(4) defines "unavailable" to include a situation where the witness "is unable to be present or to testify at the hearing because of . . . then existing physical or mental illness or infirmity[.]" If the declarant is unavailable as a witness, MRE 804(b)(1) permits "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." If the proposed testimony falls within a firmly rooted exception to the hearsay rule, admission of the testimony does not violate a defendant's right to confrontation. See *People v Meredith*, 459 Mich 62, 69; 586 NW2d 538 (1998). MRE 804(b)(1) is a firmly rooted exception to the hearsay rule, and evidence admitted under the rule bears sufficient indicia of reliability to satisfy confrontation clause concerns. *Id.* at 70-71.

We find no plain error in the trial court's determination that Sirriana qualified as an unavailable witness under MRE 804(a)(4). According to a letter from one of his physicians, Sirriana was hospitalized in Los Angeles, California, for advanced HIV infection and impacted kidney stones and was unable to travel to Detroit to testify at trial. The preliminary examination gave defendant an opportunity to cross-examine the witness under a similar motive. MRE 804(b)(1). During cross-examination, defense counsel attacked Sirriana's credibility and elicited that he was under the influence of illegal prescription drugs on the day of the incident. Accordingly, we find no error, plain or otherwise, in the admission of Sirriana's preliminary examination testimony. MRE 804(b)(1).

Defendant also claims that he is entitled to a new trial because the trial court allowed Sirriana to testify regarding defendant's alleged involvement in "an illegal drug trade." We disagree.

Because defendant failed to object to the evidence below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines, supra*.

The admissibility of evidence of a defendant's other crimes, wrongs, or acts is governed by MRE 404(b). Evidence is inadmissible under MRE 404(b) if it is offered for the improper purpose of proving the defendant's character or propensity to commit the crime. But 404(b) evidence is admissible where it is relevant to an issue or fact of consequence at trial and is sufficiently probative to outweigh the danger of unfair prejudice. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *VanderVliet, supra* at 75.

Here, because it is not clear or obvious that the challenged evidence could not have been received successfully and correctly under MRE 404(b), defendant has failed to demonstrate plain error. *Carines, supra* at 763. The record demonstrates that the evidence was not offered to show

defendant's bad character or that he committed the charged offense merely because he was involved in illegal prescription drug trafficking. Rather, the evidence regarding defendant and the victim's involvement in the illegal prescription drug business was probative of defendant's identity as the perpetrator of the offense. Because identification was the most contested issue in this case, there were legitimate, material, and contested grounds on which to offer the evidence. Additionally, we find that defendant has failed to persuasively argue that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. Particularly, the challenged evidence demonstrated the extent of defendant's and the victim's relationship, as well as a reason why defendant would be at the victim's house on a daily basis. The evidence was also probative of Sirriana's credibility by explaining his familiarity with defendant, the victim, and the crime scene. Sirriana testified that, in June 1982, he used prescription drugs daily and was at the victim's house daily, and that defendant was also at the victim's house daily, including the day of the shooting. Typinski also testified that she recognized defendant as the shooter because he was at the victim's house frequently.

In a related argument, defendant claims that he was denied the effective assistance of counsel because defense counsel failed to object to the MRE 404(b) evidence. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Even though defense counsel did not challenge the admission of the MRE 404(b) evidence, defendant has failed to demonstrate that he was prejudiced by defense counsel's inaction. As discussed previously, the evidence was not inadmissible under MRE 404(b), and, therefore, any objection would have been futile. Counsel is not required to make a frivolous objection, or advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Accordingly, defendant cannot demonstrate that there is a reasonable probability that but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*.

Defendant raises several additional claims in propria persona. In presenting these claims, defendant makes several statements that are outside the lower court record. Because no *Ginther* or evidentiary hearing was held, this Court's review is limited to the lower court record. See *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998); MCR 7.210(A)(1). Additionally, defendant cursorily presents his claims, sets forth only general legal principles governing his claims, and cites a litany of testimony from the record. A party may not simply announce his position and rely on Court to discover and rationalize the bases for the claims.

Thus, these issues are waived. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nevertheless, because defendant filed the brief in pro per, we will address the issues briefly.

We conclude that Typinski provided sufficient evidence to support defendant's convictions. Although defendant argues that she was not a credible witness, that issue was properly left to the jury. Further, we are not persuaded that the verdict was against the great weight of the evidence. We also reject defendant's claims of ineffective assistance of counsel as unsupported by a showing of serious error or prejudice. Nor has defendant established prosecutorial conduct requiring reversal. Lastly, we find no deficiency in the trial court's findings of fact.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Helene N. White  
/s/ Michael R. Smolenski