

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE L. WILSON,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 247211

Wayne Circuit Court

LC No. 02-006850

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to mandatory life imprisonment for the first-degree premeditated murder conviction, life imprisonment for each of the three assault with intent to commit murder convictions, six to ten years' imprisonment for the felon in possession of a firearm conviction, and five consecutive years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts and Procedure

In early September 2000, defendant approached Ruby Griswold, who lived with Cornelius Terry Moore at a house on Acacia Street, and asked her if Moore lived there. When Griswold asked defendant to identify himself, defendant responded, "[J]ust tell him I'll be back."

At about midnight on September 17, 2000, Griswold and Moore were in their bed in the basement of the Acacia Street house, when Griswold heard knocking on the front door of the home. When she went to the door, she saw a young woman, who told her that she was "Fred's daughter" and that she required Moore's assistance in helping her board up her property after a break-in. Griswold attempted to awaken Moore, but when he was unresponsive, she retrieved a hammer and nails and told the woman that she would help. After Griswold stepped out of the house onto the porch, defendant approached her, put a gun to her head, and told her to open the door. Griswold opened the door and defendant pushed her inside toward the back of the house. Defendant was angry and kept asking Griswold, "[W]here is he at?" The unidentified woman, who was now holding a gun, then pushed Griswold into the bathroom. Defendant proceeded to

one of the bedrooms and knocked on the door. Griswold began struggling with the woman and the woman's gun discharged. The bullet hit Griswold in the back of her ear and exited her cheek. Griswold continued to struggle with the woman when defendant entered the bathroom and struck her, knocking her into the bathtub. Defendant then shot Griswold in the arm as she raised it to defend herself. Griswold managed to escape by climbing out of the bathroom window.

Meanwhile, Wanna Powell, the owner of the Acacia Street house, and her boyfriend, Jerry Boyd, became concerned when they heard knocking on their bedroom door and then gunshots. Boyd grabbed a club and Powell opened the door. Powell was immediately confronted by defendant and the unidentified woman, who both began shooting. Defendant shot Powell in the leg and the woman entered the bedroom and attacked Powell, hitting her in the head with a hammer. Boyd grabbed defendant and the two began to "tussle." During the struggle, defendant shot Boyd four times. Powell and Boyd kept asking defendant and the woman who they were looking for. Defendant yelled, "[W]here's the ***** at?" Powell was able to wrestle the hammer away from the woman, but the woman grabbed Powell's neck and began strangling her. The woman then abruptly got up and left with defendant.

After defendant and the woman left, Powell walked across the hall to the bedroom of her daughter, Tiara Powell, who was also Moore's daughter. Powell discovered Tiara in her bed with a bullet wound in her face. Tiara was still breathing at that point, but died a short time later. When Moore emerged from the basement, defendant and the woman were gone.

II. Analysis

A. Bad Acts Evidence

Defendant first argues that the trial court abused its discretion in admitting evidence that he shot and killed Edward Burton on July 5, 2000.¹ The trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). When the underlying decision involves preliminary questions of law, such as whether a rule of evidence precludes admission, the question is reviewed de novo. *Id.* The evidence of the July 5, 2000, shooting was admitted under MRE 404(b)(1), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

¹ In a separate trial regarding the events of July 5, 2000, a jury convicted defendant of first-degree premeditated murder, MCL 750.83(1)(a), felon in possession of a firearm, MCL 750.224f, and felony-firearm, second offense, MCL 750.227b. These convictions are the subject of defendant's appeal in Court of Appeals Docket No. 246893.

The following factors must be present for “bad acts” evidence to be admissible: (1) the prosecutor must offer the evidence under something other than a character or propensity theory; (2) the evidence must be relevant under MRE 402;² and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403.³ *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Defendant contends that evidence of the events of July 5, 2000, should not have been admitted under MRE 404(b), because the prejudice from the admission of the evidence substantially outweighed its probative value. We disagree. The disputed evidence showed that on July 5, 2000, Burton drove Moore to the home of Fred Jones and defendant’s mother, Gail Wilson. When they arrived, Burton stopped the car and sounded the car horn to summon Jones. Defendant emerged from behind the house, appearing agitated and yelling profanities at Burton for blowing the horn in front of his mother’s house. Defendant walked up to the driver’s side of the car and punched Burton in the face. Burton pulled into the driveway of the home, striking Gail’s parked car. Defendant picked up a cinderblock and threw it at Burton’s front windshield, breaking the glass. When Moore grabbed defendant, defendant told Gail to “get the gun.” Gail ran into the house and came back out holding a gun. Burton drove away, but after a few blocks, he noticed a small red car following them. Burton unsuccessfully tried to evade the red car, and eventually pulled into an alley. Egress from the alley was blocked by a parked van. Defendant stopped his car, got out, and ran into the alley. Moore fled the car on foot when he saw defendant entering the alley with a gun. Moore then heard gunshots. A witness saw defendant jog out of the alley, throw a gun into the backseat of the car, and drive away. When Moore returned to the alley a short time later, he found Burton in the driver’s seat of his car with a fatal gunshot wound in his head.

The prosecution offered the evidence surrounding Burton’s murder for the proper purpose of rebutting defendant’s theory that he was mistakenly identified as the male shooter at the Acacia Street house, and to show that he had a motive to shoot the people in the Acacia Street house. The evidence showing that defendant murdered Burton and that Moore witnessed the murder is relevant to show that defendant’s motive for entering the Acacia Street house was to find and kill Moore, who was the only witness who both saw defendant with a gun at the scene of the shooting and could identify defendant as the murderer. This evidence supported the prosecution’s theory that defendant shot anyone who got in his way in his search for Moore. Therefore, this evidence was introduced for a proper purpose and was relevant.

Additionally, the trial court did not err in determining that the probative value of the evidence concerning the July 5, 2000, events was not substantially outweighed by the danger of

² Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

³ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MCR 403.

unfair prejudice under MRE 403. The evidence surrounding Burton's murder was highly prejudicial against defendant, especially given the apparent complete lack of justification for the murder and the execution-style killing of Burton, a seventy-two-year-old man who defendant had chased down and trapped in an alley before killing. However, "[t]he fact that evidence is damaging and harms the opposing party does not indicate that it is unfairly prejudicial." *Chmielewski v Xermac, Inc.*, 216 Mich App 707, 710; 550 NW2d 797 (1996), *aff'd* 457 Mich 593; 580 NW2d 817 (1998). All evidence presented by the prosecution is "prejudicial" against the defendant to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), *mod* 450 Mich 1212 (1995). But "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Evidence of Burton's murder was not marginally probative, as it was relevant to show defendant's motive for the Acacia Street house shootings, and to show that defendant was properly identified as the perpetrator of the Acacia Street house shootings. Absent the evidence regarding Burton's murder as background information, the jury might not have been able to formulate an understanding of the events (e.g., why defendant was asking, "[W]here is he at?" while he was shooting people in the Acacia Street house) or accurately evaluate defendant's motivation behind the shootings. Furthermore, the trial court attempted to minimize any prejudice by instructing the jury that it should only consider the evidence of the Acacia Street house shootings to determine the identity of the person who committed the crimes and not to show that defendant committed the Acacia Street house shootings because he is a bad person, is likely to commit other crimes, or is guilty of other bad conduct. Juries are generally presumed to follow their instructions. *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001). Therefore, we conclude that the trial court did not abuse its discretion in determining that the evidence was admissible, as the probative value of the evidence was not outweighed by the danger of unfair prejudice.

B. Ineffective Assistance of Counsel

Defendant also argues that his trial counsel was ineffective for failing to challenge the admissibility of the photographic lineup identifications of two witnesses (Boyd and Griswold). In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Sabin, supra* at 659. Here, defendant failed to move for an evidentiary hearing or a new trial. Therefore, our review is limited to the facts on the existing record. *Id.*

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant bears the

heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. In addition to showing counsel's deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra* at 694.

Defendant argues that his trial counsel should have objected to the admission of the photographic lineup identifications, because defendant had the darkest complexion of all the individuals in the lineup and the witnesses identified defendant only based on his dark skin color. There is no evidence before this Court that the lineup was impermissibly suggestive, and defendant does not argue such. Defendant merely argues that the witnesses picked defendant out of the lineup solely based on his dark complexion. "The credibility of identification testimony is a question for the trier of fact" *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of the witnesses making photographic lineup identifications does not affect the admissibility of the identification testimony. Additionally, "[p]hysical differences between defendant and the other lineup participants goes to the weight of the identification and not its admissibility." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Because there is no indication that the photo array was impermissibly suggestive, and there were no other circumstances that made lineup identifications inadmissible, any motion to suppress the lineup identifications would have been futile. Defense counsel is not obligated to raise meritless objections to provide the effective assistance of counsel. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Furthermore, defendant attacked the credibility of the lineup identifications through cross examination of the witnesses. Defense counsel challenged the witnesses' testimony by comparing their physical descriptions of defendant to defendant's actual height and appearance. Defense counsel also raised the possibility that the witnesses were under the influence of either drugs or alcohol, as well as the insufficient lighting during the shootings. During closing arguments, defense counsel argued that Boyd only picked defendant out of the lineup because of his dark complexion. The decision to move for the suppression of identification testimony is a matter of trial strategy, *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985), and defense counsel elected to attack the credibility of the witnesses' identification testimony, rather than make a futile objection to the admission of the identifications. Because defendant has not overcome the presumption that defense counsel's decision not to challenge the admissibility of the identification testimony was not sound trial strategy, *Carbin, supra* at 600, we reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra