STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2004
v	No. 232827 Wayne Circuit Court
RODNEY WILLIAMS, Defendant-Appellant.	LC No. 00-004026 ON REMAND

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right after a jury convicted him of felony murder, MCL 750.316(1)(b), and felony-firearm, MCL 750.227b.[1] Our Supreme Court, holding that defendant's waiver of counsel mid-trial to proceed in propria persona was unequivocal, knowing, and voluntary,[2] reversed this Court's prior decision[3] to the contrary and remanded this case for our consideration of defendant's remaining claims. We affirm.

We first note that our Supreme Court did not address one of defendant's other claims, which this Court previously rejected. Because it is unclear whether this issue is within the scope of Our Supreme Court's remand order, we adopt that part of our prior opinion addressing defendant's speedy trial claim:

> Defendant also argues that he was denied a speedy trial. Specifically, defendant claims that his convictions should be reversed because he was not brought to trial until about nine months after his arrest. This issue lacks merit. We review denovo [sic] a speedy trial claim. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). "In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay;

[1] Defendant was also convicted of armed robbery, MCL 750.529, but the trial court on double jeopardy grounds vacated this conviction.

[2] 470 Mich 634, 636, 647; 683 NW2d 597 (2004).

[3] Unpublished opinion per curiam, issued February 28, 2003 (Docket No. 232827).

> (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay." *Id*., quoting *People v Levandoski*, 237 Mich App 612, 620 n 4; 603 NW2d 831 (1999). The burden is on the defendant to show prejudice when the length of the delay is less than eighteen months. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). After reviewing the above factors, the lower court record in this matter, and defendant's allegation that he suffered anxiety while awaiting trial, we conclude that defendant has not met his burden of showing prejudice from a delay of relatively short duration. *Id.* at 112-113. Reversal of defendant's convictions is not warranted on speedy trial grounds. [Unpublished opinion per curiam, issued February 28, 2003 (Docket No. 232827), slip op at p 2.]

Next, defendant claims that the trial court erred by refusing to permit him to call Agatha Bond as a defense witness to testify regarding a statement the victim made to her over the telephone before his death. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Here, the trial court did not abuse its discretion because defendant never sought to call Bond as witness. Instead, he sought to admit her written statement as an exhibit. The trial court properly denied that request as inadmissible hearsay and also ruled correctly that it could not be used for purposes of impeachment if the declarant did not testify. Even assuming that Bond's statement embodied a dying declaration, MRE 804(b)(2), it still was inadmissible because under MRE 805, "hearsay within hearsay" is admissible only "if each part of the combined exceptions conforms with an exception to the hearsay rule provided in these rules," and no such exception permitted the introduction of Bond's written statement.

Next, defendant argues that he was denied the effective assistance of counsel when before proceeding in propria persona, defense counsel failed to bring out inconsistency in the robbery victim's identification of defendant at the preliminary examination. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, which in turn denied defendant a fair trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Our de novo review of the record convinces us that defendant has failed to overcome the presumption that counsel was employing reasonable trial strategy by not pursuing the robbery victim's preliminary examination testimony. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see, also, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."

Here, defense counsel was not ineffective in failing to pursue the witness's preliminary examination testimony. This is true for two reasons: counsel actually did seek to impeach the witness's testimony, and the preliminary examination testimony probably harmed rather than helped defendant. As a whole, the witness' testimony in the preliminary examination strongly

affirms his identification of defendant. Any supposed discrepancies it contains are merely semantical; they do not pertain to the overall assurance of the identification. Trial counsel employed sound trial strategy by electing not to impeach the witness by using this testimony; therefore, there was no ineffective assistance of counsel.

Next, defendant argues error occurred when the trial court failed to instruct the jury about the inherent unreliability of eyewitness identification. Again, we disagree.

We review jury instructions de novo and as a whole to determine whether error occurred. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Imperfect instructions will not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). We find the trial court's failure to give the requested instruction was not error mandating reversal.

Defendant relies upon *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), for the proposition that the jury ought to have been instructed that eyewitness identification is inherently unreliable. *Anderson* does contain a lengthy and wide-ranging discussion of difficulties with eyewitness identification, *id*. at 167-187, including detailed expositions of "psychological principles" underlying identification and of the approach taken by "the British [with their] no-nonsense handling of criminal cases," but its actual holding is limited to procedures for using photographic identification, *id*. at 186-187, not at issue here. *Anderson* never suggests a requirement that juries be instructed that eyewitness identification is inherently unreliable, and in the thirty years since it was decided, no such rule has been adopted.[4]

The facts in this case, moreover, do not present special difficulties with eyewitness identification, and defendant's contrary argument is unpersuasive. Two people identified defendant. One was the murder victim himself. Obviously his identification was not conveyed to the jury by him personally; it was conveyed by defendant's sister, to whom it was given. Defendant's sister was a girlfriend of the victim, and defendant and the victim were very close, as defendant acknowledged in his own testimony. The victim was certainly in an excellent position to identify his assailant. And the robbery victim (the pizza delivery man), notwithstanding attempts to attack his credibility, had no doubt that it was defendant who shot the murder victim. Although defendant argues that the porch light was not on, he ignores the fact that a bright streetlight was, and the circumstances were such that a positive identification was certainly reasonable. Similarly, defendant stresses the fact that the robbery victim noted that another person in the lineup sounded more like the perpetrator than defendant but he ignores the testimony that defendant was attempting to disguise his voice, behavior consistent with defendant's two attempts at trial to hide or turn his back to avoid being identified in court. Nor does defendant ever explain why the robbery victim's sleep deprivation after the crime rendered his identification unreliable. Moreover, though insisting that the case against him fails without

[4] Our Supreme Court recently overruled *Anderson* to the extent it extended the right to counsel to a time before initiation adversarial criminal proceedings. *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004).

the robbery victim's identification, defendant fails to explain why the murder victim's identification should be discounted.

In general, defendant's objections to the reliability of the identification amount to little more than quibbling, typified by the claim that defendant's very light and apparently not readily noticeable facial hair negated a description of him as "clean-shaven." Taken as a whole, all of the difficulties defendant raises with the identification amount to concerns over the credibility of witnesses and the weight to be given evidence, matters with which neither the trial court nor this Court may interfere. *People v Lemmon*, 456 Mich 625, 636, 646-647; 576 NW2d 129 (1998); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, the trial court, properly instructed the jury on how to evaluate witnesses' testimony, on the presumption of innocence, and the burden of proof. Thus, trial court's instructions to the jury in their entirety sufficiently protected defendant's rights. *Aldrich*, *supra* at 124.

Next, defendant claims he was denied a fair trial when without advance notice, the prosecutor elicited on cross-examination irrelevant and prejudicial information about defendant's prior gun use. Reviewed in context, we conclude that error warranting reversal did not occur.

The trial court's admission of evidence about prior bad acts under MRE 404(b)(1) is reviewed for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). But contrary to defendant's assertion on appeal, he did not preserve this issue by objecting to the prosecutor's question about prior gun use. Indeed, the question was answered without objection. Thus, our review is for plain error affecting defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

Defendant correctly argues that the prosecutor must give advance notice if he intends to introduce evidence of prior bad acts by defendant, *id*. at 453, and that evidence of other bad acts should only be admitted if relevant and for a proper purpose, with the relevance outweighing the danger of any unfair prejudice and subject to a limiting instruction upon request, *id*. at 447-448, citing *People v VanderVliet*, 444 Mich 52, 55, 74-75; 520 NW2d 338 (1993). Here, all the prosecutor did in the face of defendant's denial that is was possible that gunpowder residue could have been found on his hands at the time of the shooting, was to ask defendant whether he had ever fired a gun before. Defendant responded, "To be honest, I never shot a gun since I was about, what, about 16?" The prosecutor did not pursue the answer by asking for what at the age of sixteen defendant had used the gun, and nothing in the record suggests it was a "bad act." Rather, defendant's answer appears in context to have simply been an emphatic way of denying recent gun use, and was taken as such by the prosecutor, who responded that the implication was that defendant certainly had not used a gun within six hours of the victim's shooting. In context, the clear point of the question was to explore whether defendant might have recently used a gun for innocent reasons and which could explain the presence of the gunshot residue without implicating defendant in the victim's shooting. Quite simply, defendant's volunteered answer was not evidence of a prior bad act, nor is there any showing that the prosecutor knew of or sought to bring before the jury the fact that defendant had (for whatever unknown reason) fired a gun at age sixteen. Consequently, there was no plain error here. *Hawkins*, *supra* at 447.

Finally, defendant argues that insufficient evidence was presented at trial to establish he possessed the requisite intent to be convicted of felony murder. We review de novo a challenge

to the sufficiency of evidence to determine whether when the evidence is viewed in the light most favorable to plaintiff, a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt. *Terry*, supra at 452, citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). On the basis of the record here, defendant's argument is without merit.

Our Supreme Court in *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566, 540 NW2d 728 (1995), stated:

> "The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including armed robbery]"

Defendant implicitly concedes that there was evidence that he acted with intent to commit the felony of robbery, so the remaining question is whether there was evidence from which it may be inferred he acted with malice necessary for murder. But from evidence that defendant participated in an armed robbery with a deadly weapon, the jury could infer "defendant set in motion a force likely to cause death or great bodily harm." *Carines, supra* at 760.

Furthermore, malice which can satisfy the mens rea requirement for murder is acting with wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. Here, defendant concedes that there was evidence that he fired at a door. Also, there was evidence that someone had just come to answer the door, that defendant knew that someone had done so, and, in fact, defendant had yelled for the person to get back before firing the shot at the door. Because the natural tendency of firing a gun at a door behind which someone is standing is to cause death or great bodily harm, there was evidence from which a rational factfinder could find beyond a reasonable doubt that defendant acted with malice. Thus, viewing the identification by two eyewitnesses, which included the victim's declaration to defendant's sister, and evidence of the presence of unexplained gunpowder residue on defendant's hand in the light most favorable to the prosecution, a rational factfinder could find beyond a reasonable doubt that all of the essential elements of the crime were proved beyond a reasonable doubt. *Wolfe, supra* at 514-515.

We affirm.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey