STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2004
v	No. 248647 Wayne Circuit Court
EDWARD LEONARD MANUEL, Defendant-Appellant.	LC No. 02-008664-01

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to twenty-five to forty years' imprisonment for the second-degree murder conviction and 2 to 7½ years' imprisonment for the felon in possession of a firearm conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

I. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support a finding beyond a reasonable doubt that he was the person who killed the victim. In reviewing the sufficiency of the evidence, this Court must review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We must draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id.* at 400. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Here, defendant's wife/girlfriend, Shawn Gaines,[1] testified that on January 25, 2001, she and defendant were upstairs in Paul Barnett's drug house getting high when Barnett came into

[1] Shawn Gaines testified that she and defendant were married in a ceremony, but never registered the marriage. Gaines did not remember when the marriage ceremony took place.

the house. Defendant went downstairs and then came back and told Gaines that he was getting ready to kill Barnett. Defendant went back downstairs and Gaines heard tussling and then two gunshots. Richard Harrison, who had come to the house to buy drugs, testified that he saw two people tussling in the house. When Harrison knocked on the door of the house, defendant answered and told him to come back later. As Harrison was leaving, he saw Barnett stumble out the door, fall down the porch stairs, stagger into the street, and fall down. Defendant then came out of the house and shot Barnett with what looked like a rifle. According to Gaines, defendant came back upstairs in the house holding a small gun and told her, "Let's go." The two ran away from the house and defendant threw the gun in an alley. Defendant then flagged down a taxi and they escaped. The next morning, defendant and Gaines fled to Indianapolis and took up residence there. Viewed in the light most favorable to the prosecution, this evidence was sufficient to establish defendant's identity as the shooter beyond a reasonable doubt.

II. Voluntary Manslaughter Instruction

Next, defendant argues that the trial court erred in denying his request for a jury instruction on the lesser included offense of voluntary manslaughter.[2] This Court generally reviews claims of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Here, the trial court refused to give the requested instruction, ruling that voluntary manslaughter was a cognate lesser offense of murder, thereby precluding it from instructing on that offense as a matter of law under *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). In this regard, the trial court erred, because voluntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Nonetheless, when a defendant is charged with murder, an instruction on voluntary manslaughter is required only if supported by a rational view of the evidence. *Id.*, citing *Cornell, supra*.

"Manslaughter is murder without malice." *Mendoza, supra* at 534. "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id.* at 535. Provocation is the circumstance that negates the presence of malice. *Id.* at 536. "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. . . . [T]he provocation must be adequate, namely, that which would cause a reasonable person to lose control." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000) (emphasis omitted).

[2] Although defendant's request for a voluntary manslaughter instruction is inconsistent with his defense of mistaken identity, a defendant may advance inconsistent defenses. MCR 2.111(A)(2).

Here, while the prosecution presented evidence that defendant and the victim "tussled" before the victim was shot, there was no evidence that the "tussling" or shooting occurred in the heat of passion, caused by adequate provocation. On the contrary, Gaines testified that defendant told her ahead of time that he was going to kill the victim. Because a rational view of the evidence did not support an instruction on voluntary manslaughter, the trial court's failure to give the requested instruction was not an abuse of discretion.

III. Evidentiary Issues

"We review for a clear abuse of discretion the trial court's decision to admit or exclude evidence." *People v Houston*, 261 Mich App 463, 465; 683 NW2d 192 (2004).

A. Bad Acts Evidence

Defendant argues that the trial court abused its discretion in admitting evidence that should have been excluded 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.

For "bad acts" evidence to be admissible, the following factors must be present: (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; 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).

1. Defendant's Offer to Purchase a Gun

Defendant argues that the trial court abused its discretion by admitting a witness's testimony that, about two weeks before the shooting, Barnett offered to sell a .32-caliber handgun to the witness, but that defendant, who was present, offered to purchase the gun instead. Defendant argues that this testimony was not relevant, was inadmissible under MRE 404(b), and was unduly prejudicial under MRE 403, because there was no evidence that the .32-caliber handgun at issue was the same gun used in the shooting. We disagree.

[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.

Evidence was presented at trial that the victim was shot with a .32 caliber gun. Although the gun was never recovered, evidence that defendant offered to purchase a gun of the same caliber involved in the shooting was directly relevant to his identity as the shooter. See *Houston, supra* at 467. The prosecutor did not present the evidence for the prohibited purpose of proving that defendant committed the crimes charged in accordance with a pattern of historical misconduct. *Id.* at 468. Because the evidence was not offered to prove defendant's character to show that he acted in conformity with that character in committing the crimes charged, and the evidence was relevant to identifying defendant as the killer, MRE 404(b) was not implicated. *Id.* at 468-469. Furthermore, the evidence was not unfairly prejudicial under MRE 403, because the testimony did not show that defendant committed another crime, the prosecutor did not suggest that the evidence established a link between defendant's conduct and his character, and the evidence was highly probative to the issue of defendant's identity as the shooter, a contested issue at trial. *Id.* at 468. Accordingly, the trial court did not abuse its discretion in allowing the evidence.

2. Defendant's Violence Against Gaines

Defendant also argues that reversal is required because Gaines's testimony concerning his past acts of violence toward her was inadmissible under MRE 403 and MRE 404(b). We disagree. Because defendant did not object to this evidence below, our review of this issue is limited to plain error affecting defendant's substantial rights. *Houston, supra* at 466, citing *Carines, supra* at 763.

The disputed evidence included Gaines's testimony that defendant was abusive and that she was scared of him. She testified that in May 2001, while they were living in Indianapolis after the murder, she and defendant got into a fight and defendant started jumping on her. When Gaines indicated that she was going to leave him, he held her mouth and said, "You going to tell, ain't you?" When a police officer arrived, Gaines was bleeding from her mouth. Gaines told the officer that defendant had reached into her mouth and tried to pull out her tongue because she knew he had committed a murder or was involved in a shooting. Gaines testified that defendant had also stabbed her in the neck with a screwdriver that day.

This evidence was relevant to rebut defendant's theory that he was mistakenly identified as Barnett's killer and demonstrated defendant's consciousness of guilt. By presenting evidence that defendant physically abused Gaines when he became fearful that she was going to reveal his identity as the murderer, the prosecution supported its theory that defendant was correctly identified as the person who murdered Barnett. Therefore, the evidence was introduced for a proper purpose and was relevant.

Additionally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. "The 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 defendant's attempt to tear out Gaines's tongue was not

marginally probative, as it was relevant to show identification, and identification was the most important issue at trial. Therefore, we conclude that the probative value of the evidence was not outweighed by the danger of unfair prejudice.

Furthermore, the admission of this testimony did not affect defendant's substantial rights because defense counsel also raised the issue of defendant's violence toward Gaines and used it to defendant's advantage. Defense counsel discussed defendant's abuse of Gaines in his opening statement and later questioned Gaines about the abuse on cross-examination. Defense counsel used this testimony to support his theory that Gaines lied about defendant being the shooter because she wanted revenge for his violence against her. Moreover, the admission of this evidence did not affect the outcome of the trial because there was strong evidence from more than one witness that defendant was the murderer. Therefore, the admission of the testimony regarding defendant's violence toward Gaines was not a plain error that affected defendant's substantial rights.

Defendant also argues that this evidence was inadmissible because the prosecution failed to give notice in advance of the trial that he intended to elicit this testimony. MRE 404(b)(2) provides, in pertinent part:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence.

We conclude that the prosecution's alleged failure to comply with MRE 402(b)(2) did not affect defendant's substantial rights because the evidence was properly admitted. *Houston*, *supra* at 466. Furthermore, defendant has never suggested how he would have reacted differently to this evidence had the prosecution given notice, and there is no indication that the lack of notice had any effect on the verdict. *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

B. Harrison's Prior Consistent Statement

Next, defendant argues that the trial court abused its discretion by admitting, under MRE 801(d)(1)(B), Harrison's prior consistent statement to police that he saw defendant shoot Barnett. We disagree. Where a prior out-of-court statement of a witness is consistent with his trial testimony, the prior statement is hearsay and is generally not admissible as substantive evidence. *People v Washington*, 100 Mich App 628, 632; 300 NW2d 347 (1980). But the statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . . [MRE 801(d)(1).]

For a prior consistent statement to be admissible under MRE 801(d)(1)(B), it must have been made before the motive to fabricate arose. *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001).

In defense counsel's opening statement, he indicated that Harrison was involved in another pending drug case in which he violated probation, and that he was going to testify against defendant in order to obtain favorable treatment from the prosecutor in the pending case. Defense counsel then proceeded to cross-examine Harrison regarding his pending drug case and his motives for testifying against defendant. During his closing arguments, defense counsel again suggested that Harrison was testifying falsely against defendant in order to curry favor with the prosecution. Harrison's pending drug case arose after he had given the disputed prior statement to police. Under the circumstances, the prior consistent statement was not hearsay because it was offered to rebut defendant's charge of improper motive, the statement was made before the alleged motive to fabricate arose, and the defense could have cross-examined the witness concerning the statement. MRE 801(d)(1)(B); *McCray*, *supra* at 642. Therefore, the trial court did not abuse its discretion in admitting the statement.

IV. The Missing Witness

Next, defendant argues that the trial court erred in ruling that the police and the prosecution used due diligence in attempting to produce Franklin Sims as a witness. Defendant also argues that, because due diligence was not used to attempt to produce Sims at trial, the trial court erred in denying defendant's request for a "missing witness" instruction, CJI2d 5.12, instructing the jury that the it should infer that testimony from Sims, who defendant argued was the actual murderer, would have been unfavorable to the prosecution.[4] We disagree. "We

[4] Defendant contends that, in declining to give CJI2d 5.12, the trial court erroneously relied on this Court's decision in *People v Perez*, 255 Mich App 703, 708-710; 662 NW2d 446 (2003), wherein this Court concluded that the instruction was no longer viable because there was "no justification" for it under MCL 767.40a. As defendant correctly observes, this Court's decision in *Perez* was subsequently vacated in part by our Supreme Court, which held:

> While we agree with the Court of Appeals that the trial court did not err in rejecting defendant's request for CJI2d 5.12 in this case, we do not agree with the Court's broader conclusion that there remains "no justification" for such an instruction. Nothing in MCL 767.40a . . . forecloses the possibility of a situation arising in which it would be appropriate to read this instruction.
>
> For example, MCL 767.40a permits a prosecutor to add or delete from the list of trial witnesses only "upon leave of the court and for good cause shown or by stipulation of the parties." *Accordingly, CJI2d 5.12 may be appropriate if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused.* [*People v Perez*, 460 Mich 415, 420-421; 670 NW2d 655 (2003) (emphasis added).]

Here, although the parties discussed the continuing viability of the missing witness instruction in (continued…)

review a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

"A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial." *Eccles, supra* at 388. But the prosecution may be excused from the duty to produce an endorsed witness by showing that the witness could not be produced despite the exercise of due diligence. *Id.* Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). "The test for due diligence is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it." *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). "If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Eccles, supra* at 388.

Although the prosecution did not subpoena Sims in the instant case, the record reveals that Sims had been criminally charged in an unrelated matter, and a subpoena had been prepared for him in that case. The prosecutor was going to serve Sims with this subpoena when Sims appeared at his preliminary examination approximately three months before defendant's trial, but Sims failed to appear. Consequently, an arrest warrant for Sims was issued, and the police went to Sims's house to arrest him, but were unable to gain entry. The prosecutor indicated that he talked to Sims on the telephone and told him that he had a legal obligation to appear as a witness at defendant's trial. At trial, a police officer testified that the police were still looking for Sims, but had been unable to find him. In *People v Grunbaum*, 170 Mich App 821, 824; 429 NW2d 239 (1988), this Court held that the trial court did not abuse its discretion in finding that the prosecution had used due diligence to find a missing witness where the witness had been charged with an unrelated crime, a bench warrant had been issued for the witness's arrest, and the warrant was still outstanding when the defendant's case went to trial. Similarly in the present case, we conclude that the trial court did not abuse its discretion in finding that the prosecution exercised due diligence in attempting to produce Sims for trial. Accordingly, the trial court did not abuse its discretion in denying defendant's request for the missing witness instruction.

V. Ineffective Assistance of Counsel

Next, defendant argues that his trial counsel was ineffective for several reasons. 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

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light of this Court's decision in *Perez*, the record discloses that the trial court did not decline to give the instruction on this basis, but instead determined that the instruction was not warranted because the witness could not be produced despite efforts to do so.

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.

A. Evidence of Defendant's Violence Against Gaines

Defendant first argues that his trial counsel should have objected to Gaines's testimony concerning defendant's violent and abusive acts toward her. However, the record discloses that defense counsel attempted to use this testimony to defendant's advantage by suggesting that Gaines was motivated to testify falsely against defendant out of spite. Defendant even admits on appeal that his trial counsel "believed the bad act evidence was a sound trial strategy." This Court does not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). That the strategy defendant's trial counsel chose ultimately failed does not constitute ineffective assistance of counsel. *Id.* at 414-415. Furthermore, as discussed in Part III(A)(2) of this opinion, this evidence was admissible and, even if it were not, defendant has not shown that he was prejudiced by the admission of this evidence.

B. Stipulation That Defendant Was Not Eligible to Possess a Firearm

Defendant next contends that his trial counsel should not have stipulated that defendant's right to possess or use a firearm had not been restored, because this stipulation relieved the prosecution of its burden of proving this necessary element of the felon in possession of a firearm charge.[5] See MCL 750.224f(2)(b).[6] We disagree. "The prosecutor must prove that the

[5] Defendant acknowledges that his counsel properly stipulated that defendant had been convicted of a specified (unidentified) felony in order to mitigate any prejudice that might result from the disclosure of the nature of this conviction.

[6] A person convicted of a specified felony shall not possess . . . a firearm in this state until all of
(continued…)

defendant's right to possess a firearm has not been restored only if the defendant produces some evidence that his right has been restored." *People v Perkins*, 262 Mich App 267, 271; ___ NW2d ___ (2004). Here, there is no evidence on the record that defendant's right to possess a firearm had been restored. Therefore, there is no indication that defense counsel's stipulation prejudiced defendant.

C. Cautionary Instruction

Defendant also contends that his trial counsel erred in failing to request that the trial court instruct the jury that it was to consider his prior felony conviction only as it related to the felon in possession of a firearm charge. However, defendant's counsel could have validly decided that such an instruction would only call undue attention to defendant's status of a convicted felon. Defendant has not overcome the presumption that counsel's conduct constituted sound trial strategy. *Carbin, supra* at 600.

VI. Cumulative Errors

Finally, defendant argues that the cumulative effect of several errors denied him a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. [*People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).] Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* at 388." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002). Here, because we have not found any errors at trial, we reject defendant's claim that the cumulative effect of multiple errors deprived him of a fair trial. *Id.*

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra

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the following circumstances exist: . . . (b) The person's right to possess . . . a firearm has been restored . . . . MCL 750.224f(2)(b).