STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 244062 Wayne Circuit Court
JAMES ALFRED JONES, Defendant-Appellant.	LC No. 01-013853-01

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

I. Overview

A jury convicted James Jones of first-degree murder,[1] three counts of assault with intent to murder,[2] possession of a firearm during the commission of a felony,[3] and felon in possession of a firearm[4] for his role as the driver in a drive-by shooting that left one person dead and one injured. The trial court sentenced Jones to life imprisonment for the first-degree murder conviction, fourteen years and three months to twenty-five years' imprisonment for each of the assault with intent to murder convictions, two years' imprisonment for the felony-firearm conviction, and two to five years' imprisonment for the felon in possession of a firearm conviction. Jones appeals as of right. We affirm.

II. Basic Facts And Procedural History

On November 14, 2001, Jones was robbed near Ahmad Akins' house. Edward Martin and Phillip Mason, who knew Jones from the neighborhood, witnessed the robbery. According to Martin, Jones may have thought Martin and Mason were connected to the robbery.

[1] MCL 750.316.

[2] MCL 750.83.

[3] MCL 750.227b.

[4] MCL 750.224f.

The following afternoon, at approximately 5:00 p.m., approximately thirteen people were standing on the northwest corner of Heyden and Clarita in Detroit, in front of Akins' house, including Akins, Martin, Mason, Demetris Purdue and Joseph McCrimon. As Akins was entering the house, Jones slowly drove by in his green Oldsmobile Aurora with two other occupants, one in the passenger seat and one in the back seat. Martin stated he clearly saw the driver and identified him as Jones. The car stopped at the stop sign and the occupants grimaced at the crowd, but did not speak. The car then turned right onto Clarita and drove toward Evergreen Road.

About two or three minutes later, Akins walked out of the house and was standing on the front porch when the Oldsmobile drove by again and a person in the backseat fired 20 to 30 rounds from an AK-47 into the crowd. Akins was shot on the top of the head, but survived. Perdue was shot in the lower back and left leg, and died from his injuries. When police arrived on the scene, Martin identified Jones as the driver.

On November 16, 2001, a police officer went to Martin's house. The police showed Martin and McCrimon a photograph of Jones, who Martin identified as the driver of the vehicle. On November 18, 2001, Martin, Mason and McCrimon went to the police station and picked Jones out of the lineup.

Before the trial, the trial court held a *Wade*[5] hearing on Jones's challenge to the lineup. Jones argued that he was not similar in appearance to the other members of the lineup and that two of the identifiers were shown a photograph of Jones beforehand. The police had shown Martin and McCrimon the photograph of Jones because, prior to that, he had only been identified by his street name, "Fresh." Martin and McCrimon established that Jones, the man in the photograph, was Fresh. Following this, a lineup was arranged and Martin and McCrimon picked Jones out of the lineup as the driver of the vehicle. Dennis Shrewberry, the court-appointed attorney for the lineup, noted that Jones's hair was substantially different from the other participants. Martin identified Jones as the driver, but stated that he had not done any of the shooting. McCrimon also identified Jones, and stated that Martin had said that Jones had been driving. McCrimon stated that Jones was the person who a police officer "showed us the picture of." Jones was the only one in the lineup who was clean shaven, he had a different hairstyle than the other participants, and was the only one wearing a tee-shirt rather than a jacket.

Martin testified at the *Wade* hearing that before November 2001, he had known Jones from the neighborhood for about a year. During the shooting on November 15, 2001, Martin saw Jones driving the car. Police showed Martin a photograph of Jones and he identified the photograph as Jones. On November 18, 2001, Martin picked Jones out of a police lineup.

The trial court denied the motion to suppress the identification, stating that the showing of the photograph was for the legitimate reason of trying to verify the identity of the man who Martin identified as "Fresh," and that Jones had failed to meet the burden of proof that the lineup was improper. The court noted that there was no description of the driver of the vehicle that

[5] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

would set him apart in a lineup to lead to a misidentification. The trial court found that an independent basis for the identification existed, including previous knowledge of Jones and Martin's testimony about what he witnessed during the shooting.

At the outset of trial, Jones's attorney indicated that Jones wished to retain a different attorney, and the following exchange took place:

> *MS. FREDRICK (Defense Attorney)*: On Friday afternoon after we had brought Mr. Jones over for the purpose of trying to take a plea on the matter that fell through, the family and Mr. Jones advised me that they had the intent to retain Mr. Terrell Thomas to proceed with this matter. And, in fact, I should prepare his documents to transfer to Mr. Thomas.
>
> I spoke to Mr. Thomas a couple of times Friday, Friday evening. He is supposed to be here this morning. Clearly, I understand that if he is not here, I need to proceed on Mr. Jones' behalf. However, Judge, I think that in light of some of the circumstances of Friday, my advocacy has been diminished substantially by some of the conversations that took place on the voice mail messages and so forth and --
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> *THE COURT:* You have prepared this case for trial, right?
>
> *MS. FREDRICK*: Yes, I have.
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> *THE COURT:* Are you prepared to go to trial?
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> *MS. FREDRICK:* Mr. Jones is waving me off. I understand, Judge.
>
> *THE COURT:* It is ten o'clock in the morning on a Monday morning for this trial. This trial has been set for at least two or three months I believe. I think I set this trial date back in March at the very least. That is it [sic] was set for trial.
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> *MS. FREDRICK:* Yes, sir.
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> *THE COURT:* And we have a jury waiting here. It is ten o'clock in the morning. This court has not been contacted by any other lawyer or attorney for any kind of appearance or any kind of request about entering this case.
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> *MS. FREDRICK:* I understand, Judge.
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> *THE COURT:* We are going to proceed to trial with this case. So, bring in the jury please.

After the jury returned its guilty verdicts, Jones moved for an evidentiary hearing and a new trial on the basis of ineffective assistance of counsel, arguing that his lawyer failed to present his alibi defense, failed to call the lineup attorney to challenge the identification testimony at trial, and failed to call Jones as a witness at both the *Wade* hearing and the trial itself.

At the *Ginther*[6] hearing, Jones testified that on November 18, 2001, he discussed with defense counsel, Leesa Fredrick, the defense that he was at the home of his mother, Diane Jones, at the time in question. Jones stated that his ex-girlfriend, Anessah Broadnax, dropped him off at his mother's house at 3:20 or 3:30 p.m. and he took a shower. Jones stated that when he got out of the shower, Diane Jones; his grandmother, Juanita James; his sister, Paris; and a neighbor, Regina, were at the house. Jones left the house at about 5:30 or 6:00 p.m. Broadnax went into the house to get him, they ate at the house, then they left. Jones expected Fredrick to call Jones, James, Broadnax, and Regina as alibi witnesses. Jones learned four days before trial that she was not going to present an alibi defense because juries seldom believe alibis that depend on family members. Jones stated that he chose not to testify after he was instructed not to testify.

Diane Jones testified that she was home on November 15, 2001, recovering from a November 3, 2001, surgery, when Jones came to her house to take care of her. Diane Jones could not recall what time Jones arrived in the afternoon, but stated that he stayed until after 5:00 or 6:00 p.m. Diane Jones stated that while Jones was there, he showered for over an hour, which was normal for him, and prepared something to eat after Paris came home from school. Diane Jones stated that James knocked on the bathroom door while Jones was in the shower and "said something funny, and he hollered back," then James left. Diane Jones stated that Broadnax returned at approximately 6:30 or 7:00 p.m. to pick up Jones. Diane Jones stated that she paid Fredrick (referring to the court costs). The first day of trial, Jones told the court that he did not want Fredrick to represent him, but had a new attorney who was waiting outside the courtroom to represent him.

Juanita James went to Diane Jones' house on November 15, 2001, at approximately 4:30 p.m. to drop off Paris Jones from school. When she arrived there, Diane Jones told James that Jones was in the shower. James heard the shower running, knocked on the door and said, "hey" but did not get a response. James was there for about ten minutes and left without seeing Jones.

Anessah Broadnax, Jones's then girlfriend, stated that she and Jones left for Diane Jones' house at approximately 2:00 p.m. on November 16, 2001. Broadnax dropped Jones off, then went to Southfield to apply for a job. She arrived in Southfield at approximately 3:00 p.m., stayed for approximately an hour, then returned to Diane Jones' house to pick up Jones. She and Jones went back to Marvin Gardens where they were staying.

Fredrick testified that she had discussed an alibi defense with Jones that included Diane Jones and Broadnax. Fredrick stated that on the night that Jones was taken into custody, she spent over seven hours with Broadnax, who was very emotional and repeatedly told Fredrick that she could not and would not testify to the alibi defense. Fredrick interpreted this to mean that Broadnax was concerned either about lying in front of the jury or having a breakdown that would make it appear that she was not being truthful.

After indecision about whether Broadnax should testify, Fredrick decided not to place Broadnax on the stand. Frederick considered an alibi defense without Broadnax testifying, but

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

concluded it was too disjointed because Diane Jones could not testify to when Jones arrived at the house and James never saw Jones at the house, but only heard the shower water running. Further, Diane Jones told Fredrick that she could not testify because she was a former police officer who had some residual issues with the police department. Fredrick stated that she continuously spoke to Jones about not being able to use the alibi defense unless Broadnax gained the courage to testify. Broadnax was present during trial, and Fredrick asked her about testifying again, with the same response. Fredrick forwarded a motion to withdraw as defense counsel to be replaced by Terrell Thomas, but the trial court denied it.

On January 15, 2004, the trial court denied the motion for a new trial, stating:

> It is clear from counsel's testimony and from the objective facts revealed by the record that she provided representation at a professional level. She was concerned about what she called the "disjointed information" from the several persons the defendant told her were alibi witnesses. Counsel concerns are supported by the testimony at the "Ginther Hearing". There are glaring discrepancies in the time and events that purports to be the basis for the alibi.

III. Request For A Continuance

A. Standard Of Review

We review the trial court's decision regarding a defendant's request for a continuance for an abuse of discretion.[7] An abuse of discretion "exists where an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made."[8] We review de novo the question whether a defendant was denied his constitutional right to present a defense.[9] However, because Jones did not raise the issue whether the trial court's refusal to grant a continuance would deny him the right to present his alibi defense, our review is for plain error that affected Jones' substantial rights.[10]

B. Right To Present A Defense

Jones argues that the trial court abused its discretion in refusing to grant a continuance for Jones to obtain new counsel, and that his Constitutional right to present a defense was denied because his counsel would not present an alibi defense. To appeal to the trial court's discretion to allow a continuance, "a defendant must show both good cause and diligence."[11]

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[7] *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003); *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

[8] *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

[9] *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

[10] *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999).

[11] *Coy*, *supra* at 18, citing *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987).

> "Good cause" factors include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments."[12]

In this case, Jones was asserting his constitutional right to counsel.[13] Jones also had a legitimate reason for asserting his right, because he had a bona fide difference of opinion regarding a fundamental trial tactic,[14] specifically, whether to call witnesses in support of an alibi defense. However, because Jones did not attempt to substitute counsel until the day of trial, Jones did not show diligence. Jones stated that he learned only four days before trial that Fredrick was not going to present an alibi defense; however, Fredrick testified that she continuously told Jones that she would not be able to use the alibi defense if Broadnax would not testify, which Broadnax had consistently told Fredrick she was unable and unwilling to do. Under these circumstances, we cannot conclude that the trial court's refusal to grant a continuance was an abuse of discretion.

Jones argues that the denial of the continuance to find counsel who would present his alibi defense resulted in the denial of his constitutional right to present a defense. Under the facts of this case, we conclude that the trial court's decision did not constitute plain error affecting Jones's substantial rights. Defense counsel vigorously questioned witnesses that the prosecution called, gave an opening statement and a closing argument of Jones's case, and suggested that the witnesses may have robbed him the day before the shooting and are now incorrectly identifying Jones as the shooter. Although defense counsel refused to present Jones's alibi defense, in light of the weakness of that defense, presenting it was unlikely to have changed the outcome of the trial. We conclude that Jones's inability to present his alibi defense was not outcome determinative, and therefore reversal is not warranted.

IV. Challenge To Photographic Lineup

A. Standard Of Review

The trial court's decision to admit identification evidence is reviewed for clear error.[15] Clear error exists when a reviewing court is left with the definite and firm conviction that a mistake has been made.[16]

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[12] *Id*., quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

[13] US Const Ams VI, XIV; Const 1963, art 1, § 20; *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

[14] See *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

[15] *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

[16] *Kurylczyk*, *supra* at 303.

B. Legal Standards

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."[17] "When 'the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person.'"[18] Even if a witness has been exposed to an impermissibly suggestive identification procedure, however, that witness' in-court identification may still be admitted if "the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification."[19] Thus, if the identification procedure was invalid, this Court should determine whether the victim had an independent basis to identify the defendant.[20] "The independent basis inquiry is a factual one," and the validity of the in-court identification "must be viewed in light of the 'totality of circumstances.'"[21]

The following eight factors should be considered in determining whether an independent basis for the identification existed: (1) prior relationship with or knowledge of the defendant; (2) the opportunity to observe the offense; (3) the length of time between the offense and the disputed identification; (4) accuracy or discrepancies in the pre-lineup description and the defendant's actual description; (5) a previous proper identification or failure to identify the defendant; (6) any previous identification of another person as the defendant; (7) the nature of the offense and the physical and psychological state of the victim; and (8) any idiosyncratic or special features of the defendant.[22]

C. Applying The Standards

We conclude that the trial court did not clearly err in admitting the identification evidence. The police had shown Martin and McCrimon the photograph of Jones not to determine whether he resembled the driver but whether he was the man they referred to as "Fresh." Martin and McCrimon later picked Jones out of a lineup as the driver of the vehicle. Although Jones's hairstyle and dress differed from the other members of the lineup, as the trial court found, there was an independent basis for the identification because Martin knew Jones and observed the offense. Martin had known Jones from the neighborhood for about a year and recognized him as the driver of the car during the November 15, 2001 shooting. Therefore, Jones's argument fails.

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[17] *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), citing *Kurylczyk*, supra at 302; *Simmons v United States*, 390 US 377, 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968).

[18] *Id*., quoting *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973).

[19] *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

[20] *Gray*, *supra* at 114-115.

[21] *Id*. at 115, quoting *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972).

[22] *Gray*, *supra* at 115-116; *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).

V. Failure To Disqualify Trial Judge

A. Standard Of Review

Because Jones did not request at trial that the trial judge disqualify himself, this issue his unpreserved, and he therefore must establish that plain error occurred that affected his substantial rights to warrant reversal.[23]

B. The Trial Judge's Comment

MCR 2.003(B)(1) provides for disqualification of a judge who cannot impartially hear a case because he is "personally biased or prejudiced for or against a party or attorney." Jones argues that the trial judge was biased against him as evidenced by the following statement he made at the arraignment: "This is really disgusting here. I put this person on probation, what, three or four months ago back in April. I put him on probation for two years for a loaded weapons charge and he goes out and kills people." Defense counsel reminded the trial judge that Jones was "still presumed innocent," to which he responded, "I don't need that argument."

While we find the trial judge's statement that Jones had "gone out and killed people" troubling, we conclude that his failure to disqualify himself does not amount to plain error. The statement appears to be an isolated expression of frustration and disappointment at finding Jones re-entangled in the court system so soon after the trial judge had placed him on probation, and does not seem to demonstrate any sort of personal animus against Jones.

Further, Jones has not demonstrated that the trial judge's failure to disqualify himself affected his substantial rights. The challenged statement was not made in the presence of the jury; thus, it could not have affected their verdict. Jones asserts that the trial judge demonstrated his bias by denying Jones' motion to suppress the identification, denying most of Jones' objections, and refusing to allow Jones to substitute counsel. However, as discussed, the trial court properly denied the motion to suppress the identification under the governing legal standards, and it is clear from the record that the trial court's refusal to grant the motion to substitute counsel was based on untimeliness, not bias or prejudice. The fact that the trial judge denied most of Jones' objections is of no import unless Jones can demonstrate that these objections had legal merit and were erroneously overruled, which Jones does not do. Therefore, we conclude that reversal is not warranted.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot

[23] *Carines*, *supra* at 763; *People v Grant*, 445 Mich 535, 548-549; 520 NW2d 123 (1994).