

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON MAURICE HAMILTON,

Defendant-Appellant.

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UNPUBLISHED

December 22, 2005

No. 255449

Wayne Circuit Court

LC No. 04-000691

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant Aaron Maurice Hamilton appeals as of right from his convictions of first-degree murder,<sup>1</sup> assault with intent to commit murder,<sup>2</sup> and possession of a firearm during the commission of a felony.<sup>3</sup> He was sentenced to imprisonment for life without the possibility of parole for the murder conviction, 50 to 100 years' imprisonment for the assault conviction, and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

**I. Background Facts**

At approximately noon on Christmas Day in 2003, defendant was driving in a residential area in the city of Inkster. He stopped and picked up a young acquaintance, Dario Dennard, who was walking through the neighborhood. Shortly thereafter, defendant parked his car in front of a house and jumped out, carrying a shotgun. Defendant fired a shot at the house and injured Dawn Lange, who was standing in front of her kitchen window. He then chased Lamarr Moy, his intended victim, through a neighboring yard, and shot him in the back with a shotgun.

When defendant left the vehicle to chase Mr. Moy, Mr. Dennard moved into the driver's seat. Mr. Dennard testified that he intended to leave the scene without defendant, but defendant returned too quickly. Mr. Dennard testified that, at defendant's direction, he then drove to a

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<sup>1</sup> MCL 750.316.

<sup>2</sup> MCL 750.83.

<sup>3</sup> MCL 750.227b.

nearby apartment building and parked the car. The two men briefly hid at the home of a friend before separating. Mr. Dennard then walked to his godmother's house where he called a relative to ask for a ride home. Paula Dennard, Mr. Dennard's mother, testified that he told her about the shooting later that evening.

While defendant and Mr. Dennard were hiding, Detective Anthony Abdallah of the Inkster Police Department responded to the scene of the shooting. When he arrived, Mr. Moy was standing on a porch, but fell to the ground when he tried to walk toward the detective. Mr. Moy was covered in blood. Detective Abdallah asked Mr. Moy to identify the shooter. However, Mr. Moy's right lung had been punctured. He did not identify his shooter; he only responded with the word "air." Mr. Moy was unable to respond to any further questions and died shortly after arriving at the hospital.

The morning after the shooting, the Dennard family awoke late and found defendant asleep on their couch. Mrs. Dennard asked defendant to explain why he shot Mr. Moy and subsequently asked him to make a written statement absolving her son of any fault. Mrs. Dennard testified that defendant instructed her to write the statement, claiming that his handwriting was messy. She testified that defendant subsequently read and signed the two-page statement. Mrs. Dennard then called the police and offered defendant a meal to stall his departure until the police arrived.

## II. Adjournment

Moments before his trial began, defendant moved for a thirty-day adjournment. He claimed that he had just discovered two *res gestae* witnesses who would bolster his defense. Defendant asserted that the first witness, Hilda Davis, would testify that she saw someone other than defendant fleeing the scene of the crime. He identified the second witness as a woman named Jennifer, but did not specify the substance of her testimony. Defendant contended that he needed more time to locate this second witness and properly subpoena them both. The trial court determined that defendant had been given ample opportunity to investigate his case and could still subpoena these witnesses, as the defense would not present its case until the following day. Therefore, the court denied the motion.

We review a trial court's denial of a defendant's request for an adjournment or continuance for an abuse of discretion.<sup>4</sup> A motion for adjournment must be based on good cause.<sup>5</sup> In determining whether defendant has presented good cause for an adjournment, the court must consider "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."<sup>6</sup> Pursuant to MCR 2.503(C), a court may grant an adjournment based on the unavailability of a witness "only if the court finds that the evidence is material and that diligent

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<sup>4</sup> *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

<sup>5</sup> *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002), citing MCR 2.503(B)(1).

<sup>6</sup> *Coy*, *supra* at 18, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

efforts have been made to produce the witness or evidence.”<sup>7</sup> Even if the trial court improperly denied the motion for adjournment, reversal is only required if defendant establishes that he was prejudiced by this error.<sup>8</sup>

While defendant alleged that Ms. Davis’s testimony could bolster his defense, he did not establish the substance of Jennifer’s testimony. Defendant asserted that he could easily locate Ms. Davis, but did not indicate his reasons for failing to attempt to subpoena her. Although the court could determine that Ms. Davis was a material witness, there was no basis for the court to determine that Jennifer’s presence would assist the defense. Furthermore, it is clear that the trial court properly determined that defendant failed to exercise due diligence in locating these witnesses. Accordingly, the trial court did not abuse its discretion by denying defendant’s motion for an adjournment.

### III. Dying Declaration

Defendant also challenges the trial court’s admission, over his objection, of Mr. Moy’s statement—the word “air”—to Detective Abdallah as inadmissible hearsay. The prosecution contended that this statement was admissible as a dying declaration pursuant to MRE 804(b)(2). Defendant contends that the jury could infer from this statement that Mr. Moy attempted to say “Aaron.” However, it appears from the record that defendant and Mr. Dennard only knew Mr. Moy by his street name—“Moe.” While there is an indication in the record that Mr. Moy knew defendant, there is no indication that he knew defendant by his proper name. Furthermore, the prosecution never argued that Mr. Moy attempted to identify defendant.<sup>9</sup> As Mr. Moy did not identify his shooter or make any statement relevant to establishing defendant’s guilt or innocence, defendant’s challenge is spurious.

### IV. Statements of Dario Dennard to Paula Dennard

Defendant also raises several challenges pro se to his convictions and sentences. Defendant first contends that the trial court improperly admitted, and the prosecutor deliberately elicited, inadmissible hearsay testimony from Paula Dennard that her son, Dario, told her that defendant shot Mr. Moy. This testimony was admitted over defense counsel’s repeated objections. Generally, a trial court’s decision to admit evidence will be reversed only for an abuse of discretion.<sup>10</sup> However, when a trial court’s decision regarding the admission of evidence involves a preliminary question of law, we review the issue de novo.<sup>11</sup> We review

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<sup>7</sup> MCR 2.503(C)(2).

<sup>8</sup> *Coy*, *supra* at 18-19.

<sup>9</sup> Defense counsel alone argued against the inference in closing.

<sup>10</sup> *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

<sup>11</sup> *Id.*

claims of prosecutorial misconduct on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.<sup>12</sup>

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>13</sup> The prosecutor did elicit testimony from Mrs. Dennard regarding her son’s statement that defendant shot Mr. Moy over defendant’s objection. The prosecution contends on appeal that the statement was admissible as a statement of Dario Dennard’s then-existing state of mind under MRE 803(3). Pursuant to that rule, “[a] statement of the declarant’s then existing state of mind . . . , but not . . . a statement of memory or belief to prove the fact remembered or believed,” is admissible as an exception to the hearsay rule.<sup>14</sup> Generally, such a statement may be admitted “‘to show the effect on the hearer . . . when this effect is relevant.’”<sup>15</sup> In this case, however, it is clear that Mrs. Dennard’s testimony was elicited to prove the truth of the fact believed. Mrs. Dennard testified that, based on her belief that defendant shot Mr. Moy, she took action to secure a confession from defendant. Under the circumstances, the trial court improperly allowed the prosecution to elicit testimony from Mrs. Dennard regarding Dario Dennard’s statement.

However, defense counsel conceded at trial that the content of that statement had already been placed before the jury through Dario Dennard’s previous testimony. Accordingly, any potential error in the admission of this evidence through Mrs. Dennard’s testimony was harmless.<sup>16</sup>

## V. Photographic Line-up

Defendant also challenges the photographic line-up conducted on the day of his arrest on several grounds. The trial court admitted the identification of defendant by Walter Lange, Dawn Lange’s brother, over defendant’s motion to suppress. Defendant alleges that he was arrested before the photographic line-up was conducted and, therefore, he was entitled to a live line-up. Defendant also challenges the lack of counsel at the line-up. Defendant further contends that the line-up was unfair, as the other men depicted in the photo array did not match his description. We review a trial court’s factual findings on a motion to suppress for clear error<sup>17</sup> and underlying legal determinations de novo.<sup>18</sup>

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<sup>12</sup> *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

<sup>13</sup> MRE 801(c).

<sup>14</sup> MRE 803(3).

<sup>15</sup> *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995), quoting 4 Weinstein, Evidence, ¶ 801(c)[01], pp 801-94 to 801-96.

<sup>16</sup> See *People v Bartlett*, 231 Mich App 139, 159-160; 585 NW2d 341 (1998) (finding the improper admission of hearsay statements harmless where the declarant had already testified regarding the substance of those statements).

<sup>17</sup> *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001).

<sup>18</sup> *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

We reject defendant's contention that he was entitled to a live line-up or representation at the photographic line-up. Contrary to defendant's assertion, he had not yet been arrested when the photographic line-up was conducted. The record evidence establishes that the photographic line-up occurred at approximately 11:30 a.m. on December 26, 2003. While defendant asserts that he was arrested at 11:00 a.m., Detroit police officer Sheldon Lloyd testified that he did not arrest defendant at the Dennard home until 1:24 p.m. Furthermore, Mrs. Dennard testified that she did not awake and find defendant in her home until 11:00 a.m. She then convinced defendant to dictate a written statement, prepared a meal for defendant, and summoned the police. As defendant was not yet in custody, it would have been impossible to conduct a live line-up. For the same reason, defendant was not entitled to representation at the photographic line-up.<sup>19</sup>

Defendant also contends that the photographic line-up was unfair as the other men depicted were of a smaller build. "The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification."<sup>20</sup> Despite his professed possession of the photo array, defendant did not provide this Court with a copy of the array until two months following oral argument in this case. Due to the poor quality of that copy,<sup>21</sup> we are unable to review the photographs and determine whether the line-up was unfair or impermissibly suggestive.<sup>22</sup> Therefore, defendant is deemed to have abandoned this issue on appeal.<sup>23</sup>

## VI. Ineffective Assistance of Counsel

Defendant alleges that he was denied the effective assistance of counsel, as defense counsel failed to: (1) challenge defendant's illegal arrest; (2) adequately impeach Dario Dennard's testimony; and (3) present an expert in handwriting analysis to challenge the authenticity of his signature on the statements that Mrs. Dennard allegedly procured. Absent a *Ginther*<sup>24</sup> hearing, our review is limited to plain error on the existing record affecting defendant's

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<sup>19</sup> See *People v Kurylczuk*, 443 Mich 289, 298; 505 NW2d 528 (1993).

<sup>20</sup> *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 764 (2002), citing *Kurylczuk*, *supra* at 306, 311-312, 318. See also *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

<sup>21</sup> This Court requested the photo array from defense counsel; however, counsel was unable to obtain the array from the prosecution. From the poor quality of the copy provided to this Court, we can only assume that defendant made a duplicate of a copy of the photo array in his possession.

<sup>22</sup> We note, however, that the defense theory was that Dario Dennard actually shot Mr. Moy and blamed defendant to cover up his crime. Nothing in the record suggests that Mr. Dennard and defendant look so alike that Mr. Lange would mistakenly identify defendant as the shooter, or that Mr. Dennard was in the photo array.

<sup>23</sup> See MCR 7.210(C). Compare *People v Wilson*, 96 Mich App 792, 795-797; 293 NW2d 710 (1980).

<sup>24</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

substantial rights.<sup>25</sup> Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.<sup>26</sup> To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.<sup>27</sup> Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.<sup>28</sup>

Defendant contends that counsel ineffectively failed to challenge the legality of his arrest. Defendant alleges that he was improperly arrested without a warrant or probable cause and was subsequently held for three days before his arraignment.<sup>29</sup> However, it is clear from the record that defense counsel did not have grounds to challenge defendant's arrest.<sup>30</sup> An individual may be arrested without a warrant if a felony has been committed and the arresting officer "has reasonable cause to believe that the person committed it."<sup>31</sup> Officers came to the Dennard home to arrest a murder suspect based on the call of a private citizen. By the time of defendant's arrest, Mr. Lange had already identified defendant as the shooter from the photographic line-up. Therefore, the arresting officers had reasonable cause to believe that defendant shot Mr. Moy.

Furthermore, contrary to defendant's assertion, he was arraigned within 48 hours of his arrest. When an individual is arrested without a warrant, he or she must be brought before a magistrate for arraignment "without unnecessary delay."<sup>32</sup> Pursuant to caselaw of the United States Supreme Court, a delay of 48 hours is neither unnecessary nor unreasonable.<sup>33</sup> Accordingly, any challenge to the legality of defendant's arrest would be frivolous.

We agree with defendant that defense counsel failed to further impeach the testimony of Dario Dennard. Generally, questions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.<sup>34</sup> The failure to introduce evidence or question witnesses can constitute ineffective assistance of counsel when it deprives a

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<sup>25</sup> *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

<sup>26</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>27</sup> *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

<sup>28</sup> *Id.* at 600.

<sup>29</sup> Defense counsel challenged the admissibility of defendant's statements following his arrest on the ground that defendant was interrogated after he requested counsel in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Defendant does not challenge the trial court's determination that he knowingly and voluntarily waived his right to counsel at that time.

<sup>30</sup> *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003) (counsel is not ineffective for failing to raise a frivolous or meritless motion).

<sup>31</sup> MCL 764.15(1)(c).

<sup>32</sup> MCL 764.26; *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000).

<sup>33</sup> *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991).

<sup>34</sup> *Rockey, supra* at 76.

defendant of a substantial defense; i.e., one that might affect the outcome of the trial.<sup>35</sup> The inconsistencies in Mr. Dennard's testimony are glaring on the record, and defense counsel should have highlighted them on cross-examination. However, it is clear from the record that the trier of fact did hear the witness's differing version of events during direct examination by the prosecutor. Although defense counsel was deficient in this regard, he did highlight the discrepancies in closing argument and, therefore, reversal is unwarranted.

Defense counsel also failed to call an expert witness to challenge the authenticity of defendant's signature on the statement allegedly dictated to Paula Dennard. Instead, defense counsel challenged Paula and Dario Dennard's motives for asserting that defendant made this statement. However, there is no indication on the existing record that an expert witness would have discredited defendant's signature. Absent an evidentiary hearing, we cannot determine whether counsel was ineffective for failing to pursue that defense.

## VII. Departure from Sentencing Guidelines

Finally, defendant challenges the trial court's departure from the minimum sentencing guidelines range for his conviction of assault with intent to murder. The minimum sentencing range for this charge was 108 to 180 months; however, the trial court sentenced defendant to a term of 50 to 100 years' imprisonment.

A sentencing court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted.<sup>36</sup> The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure."<sup>37</sup> These reasons must be objective and verifiable and keenly or irresistibly grab the court's attention.<sup>38</sup> The court may depart from the guidelines where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight.<sup>39</sup> A departure is appropriate if these reasons "lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history . . . ."<sup>40</sup> We review the sentencing court's determination for an abuse of discretion, which "occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes."<sup>41</sup>

The trial court commented at length regarding the barbaric nature of this shooting. The court noted that defendant had no reason to shoot at the Lange home. The court further noted

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<sup>35</sup> *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

<sup>36</sup> MCL 769.34(2).

<sup>37</sup> MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

<sup>38</sup> *Babcock*, *supra* at 258.

<sup>39</sup> MCL 769.34(3)(a), (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

<sup>40</sup> *Babcock*, *supra* at 264.

<sup>41</sup> *Id.* at 269.

that when defendant shot Dawn Lange, the bullet nearly struck her three-year-old child, who was sitting underneath the window through which Dawn Lange was shot. The trial court ultimately determined to depart upward from the guidelines range, as the potential harm to Ms. Lange's child was not considered in scoring the sentencing guidelines. The child's proximity to harm was supported by the record evidence and was, therefore, objective and verifiable. Under these circumstances, defendant's conduct formed a substantial and compelling reason to depart from the guidelines range and the court's actual departure did not amount to an abuse of discretion.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello