STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2005
v LARRY HARRIS, Defendant-Appellant.	No. 257104 Wayne Circuit Court LC No. 03-012062-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TORIAL BROWN, Defendant-Appellant.	No. 257256 Wayne Circuit Court LC No. 04-001269-01

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant Harris was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison on the murder conviction, five to ten years in prison on the assault conviction, and the mandatory two-year term on the felony-firearm conviction. He now appeals and we affirm.

Defendant Brown was convicted of first-degree murder, MCL 750.316, assault with intent to do great bodily harm, MCL 750.84, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. He was sentenced to life in prison on the murder conviction, three to ten years in prison on the assault with intent to do great bodily harm conviction, one to four years in prison on the felonious assault conviction, two to five years in prison on the felon in possession conviction, and the mandatory consecutive two-year term for felony-firearm. He now appeals and we affirm.

Defendants' convictions arise out of an incident occurring at the home of the decedent, Tyrone Gilmore, in the city of Detroit. Gilmore's girl friend, Kimberly Craig, who lived with Gilmore, testified that when she returned home on the day of the murder, she encountered defendant Harris in the backyard. An argument ensued over Harris having inappropriately touched Craig a day or two before. According to Craig, during the argument Harris again inappropriately touched her. As Craig went into the house, Gilmore came out, apparently having seen the incident. An argument ensued between Gilmore and Harris, with Gilmore striking Harris. Gilmore and Craig then went into the house, leaving Harris outside.

Approximately a half-hour after that incident, Craig and Gilmore heard noises in the house and went out of their bedroom to find both defendants in their house. Also in the house were two other individuals, Selina Williams (Craig's sister) and Dwayne Gentry, a friend. Craig described Brown holding a gun to Gentry's head, asking Harris "Is this him?" Harris said that it was not him, then stated, "That's him," apparently indicating Gilmore. Harris and Brown then both shot Gilmore, killing him. Craig was also shot, either contemporaneous with Gilmore or immediately after Gilmore was shot.

The murder convictions were based upon the killing of Gilmore. The assault with intent to do great bodily harm convictions were based upon the shooting of Craig. Brown's felonious assault conviction was based upon the pointing of the gun at Gentry's head.

Turning first to the claims raised by defendant Harris, he first argues that he was denied his right to a speedy trial. Defendant did not preserve this issue for appeal by making a formal demand on the record. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Although defendant states that he informed the court that he was not waiving his right to a speedy trial, we do not view that as the same as making a demand for a speedy trial. In any event, whether the defendant preserved the issue or not does not change the outcome of this issue. If the issue was properly preserved, defendant would have to show that the denial of a speedy trial resulted in prejudice. *Id.* at 112. Similarly, if the issue was unpreserved, we would review for plain error, which also requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). But the only prejudice defendant claims in his brief is the following:

> He was presented to the jury with a co-defendant, whom the witnesses had testified committed the shooting. The witnesses had also testified while they knew him less than a year, they had known defendant Brown for many years. Defendant submits the jury, viewing both defendants, and learning defendant Brown had committed the shooting, had no other choice but to find him guilty as well.

While that may be an argument that a joint trial between Harris and Brown prejudiced Harris, it does not even raise a claim of prejudice for that trial being delayed. Accordingly, defendant has failed to carry his burden of showing prejudice.

Next, defendant argues that he was denied his right to counsel when the police conducted a photographic show-up while defendant was in custody. We disagree. Defendant argues that he was in custody because the police accompanied him to the hospital and, at this time, the police showed photographs of both defendants to one of the victims while the victim was at the hospital

as well. Defendant argues that, because he was in custody, he had the right to be represented by counsel at the photographic show-up and that right was denied. We disagree.

Because defendant did not object at trial, we review this issue for plain error. *Carines, supra*. Defendant is unable to establish either plain error or prejudice. With respect to showing plain error, defendant fails in two respects. First, defendant cannot demonstrate with any degree of certainty that he was, in fact, in custody at the time the victim was shown the photo. That is, even accepting that defendant was taken into custody at some point after the shooting, he cannot establish whether that occurred before or after the victim was shown his photograph at the hospital. If the victim was shown the photograph before defendant was in custody, then the right to counsel had not yet attached under *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

Second, it is no longer clear that the right to counsel with respect to identification procedures attaches at custody. While that is the pronouncement in *Kurylczyk* with respect to photographic identifications, more recently the Supreme Court in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), stated that the right to counsel for corporeal identifications does not attach until the initiation of adversarial judicial proceedings. *Id.* at 611. While *Hickman* is a corporeal identification case and not a photographic identification, we are at a loss to come up with a reason why the right to counsel should be more expansive in a photographic identification situation than in a corporeal identification case. Indeed, before *Hickman*, the rule was that a suspect had a right to counsel at all pretrial corporeal identifications. *Id.* at 605. Thus, the right to counsel was more expansive for corporeal identifications than for photographic arrays. If *Hickman* is viewed as only applying to corporeal identifications, then that longstanding principle would be turned around, with the right to counsel at photographic identifications being more expansive by attaching at custody rather than only after adversarial judicial proceedings have been initiated.

For these reasons, we are not persuaded that defendant has demonstrated that a plain or obvious error occurred in not having defense counsel present at the photographic show-up. Additionally, we are not persuaded that defendant has met his burden under *Carines* to show prejudice. This was not a typical identification process. It was not a standard photographic line-up where the victim was shown photographs of multiple persons to determine if she could identify the suspect. Nor was it the typical on-the-scene show-up where a suspect is found shortly after the crime is committed and an identification is needed to immediately include or exclude the suspect. Rather, the witness had identified defendant by name to the police. The police then retrieved a photograph of defendant and showed it to the victim to confirm that the person in the photograph was the person the witness was identifying. The witness knew defendant from the neighborhood and had purchased drugs from him on a number of occasions. Therefore, there was no concern that this was an unduly suggestive identification procedure, *Kurylczyk*, *supra* at 302, or that there was not an independent basis for the witness' identification. Accordingly, defendant is unable to show prejudice by how the identification procedure was handled. Similarly, given the lack of prejudice, defendant is unable to establish a denial of the right to effective assistance of counsel by counsel's failure to raise this issue at trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant's final issue is that there was insufficient evidence of premeditation and deliberation to support a conviction for first-degree murder. We disagree. We review a claim of

insufficiency of the evidence by looking at the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). In the case at bar, the jury heard testimony that defendant and the victim had a fight, with defendant leaving the scene. The defendant returned approximately thirty minutes later, with a weapon and with co-defendant Brown. When Brown held a gun to Dwayne Gentry's head and asked defendant "Is this him?", defendant replied that it wasn't, then stated "That's him," apparently indicating the victim. Both defendants then shot the victim. We are satisfied that a rational trier of fact could conclude that defendant premeditated and deliberated the decision to kill.

With respect to the shooting of Craig, she was shot as part of the shooting of Gilmore. A reasonable juror could conclude that both defendants intended to shoot her as well for the purpose of killing her. Therefore, the original charge of assault with intent to commit murder was properly submitted to the jury.

We turn now to the issues raised by defendant Brown. He first argues that there was insufficient evidence to establish his guilt of either first- or second-degree murder. But based upon the evidence outlined above, we are satisfied that a rational trier of fact could conclude that defendant participated in the intentional killing of the victim with premeditation and deliberation, thus establishing a first-degree murder. It necessarily follows that there was also sufficient evidence to establish a second-degree murder.

Defendant's next argument is that the trial court erred in denying his motion for mistrial based upon prosecutorial misconduct. We disagree. One of the witnesses to the murder, Selina Williams, testified without objection that she had known defendant Harris for about a month and a half before the murder from having purchased drugs from him. Later she testified that she also knew defendant Brown before the night in question, also from having purchased drugs from him. Brown's attorney objected. An off-the-record conference was held, after which the trial court instructed the jury to disregard the testimony that the witness knew defendant Brown from using or selling drugs. Defendant thereafter moved for a mistrial, arguing that the prosecutor had improperly attempted to introduce evidence of a prior bad act. The trial court denied the motion for a mistrial without stating the basis for its decision.

Prosecutorial misconduct cannot be based upon a good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor offered a reason for introducing the evidence: identity was at issue and it was necessary to show that the witness had a basis for identifying defendant. Although the trial court rejected the prosecutor's argument and directed the jury to disregard the testimony regarding defendant's selling drugs to the witness, we are not persuaded that defendant was denied a fair trial. *Id.* at 660. We are not persuaded that the prosecutor acted in bad faith. Further, we are satisfied that the curative instruction cured any prejudice to defendant. Accordingly, we are not persuaded that the trial court abused its discretion in denying defendant's motion for mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant Brown also raises a number of issues in a supplemental brief filed in propria persona. First, defendant argues that he was denied a fair trial by the prosecutor's failure to produce a res gestae witness, Dwayne Gentry. Gentry was not produced at trial and a due diligence hearing was held. This resulted in the trial court giving an "adverse witness"

instruction to the jury. We fail to see how this could have been handled any differently. A witness who cannot be found cannot be produced. There is no evidence the prosecutor intentionally acted to keep the witness from testifying. Defendant also argues that he should have been permitted to delve into the circumstances surrounding the statement given by Gentry. But because the statement itself was not introduced, the circumstances surrounding the statement are not relevant.

In a related argument, defendant also argues that he was denied effective assistance of counsel by counsel's failure to move to produce the witness or to suppress the witness' statement. But we fail to see what more counsel could have done. The issue of the missing witness was raised in the trial court, with the trial court giving an adverse witness instruction and denying defendant's motion for a mistrial. The witness' statement was not introduced. There was nothing more that counsel could have accomplished, therefore there is no basis for finding ineffective assistance of counsel.

Defendant next argues that the prosecutor improperly vouched for the credibility of prosecution witnesses during examination and argument. Defendant acknowledges that there was no objection at trial. Accordingly, we review the issue for plain error. *Carines, supra*. Defendant, however, fails to identify in his brief any question or comment by the prosecutor that he claims to be improper. Because defendant does not identify any specific statement by the prosecutor as being improper, he has not established a plain error. Therefore, he is not entitled to relief on this issue.

Next, defendant argues that he was denied his right to a fair trial when the trial court consolidated his trial with that of the codefendant. Not only did defendant not object at trial, defense counsel specifically stated that he had no objection. Therefore, at most we can review the issue for plain error. *Carines, supra*. We are not persuaded that defendant has shown any prejudice by the joinder of the trials. The only claim of prejudice that defendant raises is that only co-defendant Harris tested positive for gunpowder residue on his hand. Defendant argues that this evidence would not have been introduced at his trial if there had been separate trials. While that is undoubtedly true, we fail to see how the evidence prejudiced defendant. If anything, it supported defendant's defense as it would support his claim that he did not shoot the victim.

Finally, defendant claims that the identification procedure employed was unduly suggestive. This issue was not raised at trial and, therefore, our review is limited to looking for plain error. *Carines, supra*. Defendant is unable to demonstrate prejudice on this issue. The witness who made the identification testified that she had known defendant for approximately four years. The police showed her defendant's photograph to confirm that he was the person she identified as one of the assailants. Because the witness had an independent basis for identifying defendant, he cannot demonstrate prejudice by any error in how the identification process was handled.

The convictions and sentences of both defendants are affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter