STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JUNIOR JOHNSON,

Defendant-Appellant.

UNPUBLISHED
November 15, 2007

No. 272823
Wayne Circuit Court
LC No. 02-011051-01

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317, two counts of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 450 to 720 months' imprisonment for the second-degree murder conviction, two to four years' imprisonment for the felonious assault convictions, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was convicted by a jury in his first trial on December 16, 2002, of first-degree murder, MCL 750.316, two counts of felonious assault, and felony-firearm. He appealed his convictions, and this Court reversed and remanded based on the trial court's error in "requiring defendant to choose between jury instructions on lesser included offenses and an alibi defense on the ground that they were inconsistent theories." *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2004 (Docket No. 246937). The instant appeal was filed after defendant's second trial in 2006.

Defendant argues on appeal that the trial court erred by denying his motion to suppress his confession. We disagree. This Court reviews a trial court's ruling on a motion to suppress de novo. *People v Van Tubbergen*, 249 Mich App 354, 359-360; 642 NW2d 368 (2002). The trial court's factual findings are reviewed for clear error, "giving deference to the trial court's resolution of factual issues." *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. (quoting *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996)).

On appeal, the prosecution concedes that police violated defendant's Fourth Amendment rights by arresting him without probable cause. Therefore, the issue is whether police obtained

defendant's confession as the result of the unlawful arrest. Whether evidence should be suppressed after an unlawful arrest is analyzed under *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963), and, in particular, whether a confession should be suppressed after an unlawful arrest is analyzed under *Brown v Illinois*, 422 US 590, 603; 95 S Ct 2254; 45 L Ed 2d 416 (1975). See *People v Mallory*, 421 Mich 229, 243 n 8; 365 NW2d 673 (1984).

Under *Wong Sun*, the question a court must ask is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, *supra* at 487-488. *Brown* further holds that *Miranda*[1] warnings do not always break the causal connection between an unlawful arrest and subsequent confession. *Brown*, *supra* at 603. The *Brown* Court opined that no single fact is dispositive, and the facts of each case must be considered when determining whether a confession obtained after an illegal arrest should be suppressed. *Id*. Under the factors delineated in *Brown*, a court should consider whether *Miranda* warnings were given, the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly the purpose and flagrancy of the official misconduct." *Id*. at 603-604 (internal citations omitted). Intervening circumstances break the causal connection where police have "uncovered evidence sufficient to establish probable cause to arrest the defendant before the challenged custodial statement was given." *People v Kelly*, 231 Mich App 627, 635; 588 NW2d 480 (1998).

Defendant was arrested at 4:00 a.m. and gave the statement at issue to the officer in charge, Barbara Simon, sometime after 12:30 p.m. the same day, for an elapsed time of eight and one-half hours between his arrest and confession. He was given his *Miranda* warnings. The record was not sufficient to determine whether Simon knew that defendant's cousin, J.B. Brown, gave a statement that implicated defendant such that probable cause was established before she started her interview of defendant. Last, given that the trial court found that police had probable cause to arrest defendant and there were no complaints of any flagrant police conduct, we conclude that the police acted in good faith. Consequently, defendant's confession was sufficiently attenuated from the unlawful arrest such that it was purged of the taint of the unlawful arrest, and therefore, the trial court did not err by denying defendant's motion to suppress his confession.

We note that the trial court did not analyze the issue under *Wong Sun* and *Brown* since it found that the arrest was lawful. However, as in *Brown*, the record was sufficient for this Court to make a determination of whether the confession was admissible, making a remand for further factual findings unnecessary. See *Brown*, *supra* at 604.

Defendant further argues that the trial court erred by denying his motion to suppress evidence of the gun, which he asserts was obtained through an illegal search. We disagree.

[1] *Miranda v Arizona*, 384 US 536; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The Fourth Amendment protects against unreasonable searches and seizure. US Const, Am IV; *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). A warrantless search of a dwelling or surrounding property, where a citizen has a reasonable expectation of privacy, is generally unreasonable absent specific exigent circumstances. *Id*. at 558; *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002). The "exigent circumstances" exception to the Fourth Amendment allows warrantless searches to prevent the imminent destruction of evidence, protect the police officer or others, or prevent the escape of a suspect, as long as police have probable cause to believe that a crime recently was committed on the premises, or that they will find evidence or the person who committed the suspected crime. *Cartwright*, *supra* at 558-559. Additionally, police can remain on a crime scene for a reasonable time without a warrant in order to investigate a crime. *Michigan v Tyler*, 436 US 499, 510-511; 98 S Ct 1942; 56 L Ed 2d 486 (1978) ("[O]fficials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.").

According to defendant, since Officer Brett Riccinto remained on the scene waiting for a tow truck to tow a car suspected to be involved in an unrelated crime, Riccinto was not legally on the premises beyond the time it took to investigate the firebombing. However, Riccinto stated that, in addition to waiting for a tow truck, he was finishing up paperwork. Thus, Riccinto was completing his investigation and was lawfully permitted to be on the premises until his investigation was completed.

Riccinto followed Brown onto defendant's property because he was concerned that Brown might tamper with the car in defendant's driveway, thus the exigent circumstance exception of preventing imminent destruction of evidence was applicable. Defendant argues that Riccinto should have departed from the premises once he saw that Brown walked past the car without doing anything to it. However, assuming no one could enter the house because of the fire, Riccinto would have been suspicious of Brown's presence anywhere on the property, and if Riccinto would have walked back to his scout car at that point and left Brown behind the house, Brown could have approached the car in the dark without being observed.

Defendant further argues that Riccinto did not have an expectation that following Brown onto defendant's property would reveal incriminating evidence. Defendant contends that without a belief that an immediate search will produce specific evidence of a crime, the exigent circumstances exception remains inapplicable to justify an entry onto a citizen's property. See *People v Jordan*, 187 Mich App 582, 586-587; 468 NW2d 294 (1991) ("Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and exigent circumstances establishing an exception to the warrant requirement.") However, the firebombed house and the car with bullet holes in it already gave Riccinto "probable cause to believe that a crime recently was committed on the premises." Therefore, Riccinto was lawfully on defendant's property because of an exigent circumstance and the gun was in plain view. We hold that the court did not err by denying defendant's motion to suppress evidence of the gun.

Defendant next argues that the trial court abused its discretion by admitting the gun into evidence when there was only nominal evidence linking the gun to the shooting. We disagree. This Court reviews preserved evidentiary issues for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant quotes from *People v Burrell*, 21 Mich App 451, 456-457; 175 NW2d 513 (1970), where this Court stated:

> To justify admission, a proper foundation must be laid, and such articles must be identified as the articles they are purported to be, and shown to be connected with the crime or with the accused; however, such identification is not required to be positive, absolute, certain, or wholly unqualified, and where there is some evidence for this purpose, objections to its sufficiency go to the weight rather than the admissibility of the articles in question.

In the instant case, the gun was recovered from defendant's property, and therefore, is connected to defendant. Additionally, both the recovered gun and the gun used to kill Bishop had lasers. Thus, defendant's objections regard the weight rather than the admissibility of the gun. The trial court did not abuse its discretion by admitting the gun into evidence.

Defendant's next claim on appeal is that he was denied the effective assistance of counsel because his counsel conceded that defendant made the inculpatory statement admitting to the shooting. We disagree. When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). A defendant must overcome the strong presumption that his counsel was effective and engaged in sound trial strategy. *Id*.; *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant relies on *Earl Wiley v Sowders*, 647 F2d 642, 650 (CA 6, 1981), for the proposition that "in the "rare cases" where counsel thinks it is advisable to admit his client's guilt, "the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record." However, when Earl Wiley's brother Elmer appealed, the Sixth Circuit concluded, "[A]n on-the-record inquiry by the trial court to determine whether a criminal defendant has consented to an admission of guilt during closing arguments represents the preferred practice. But we did not hold in *[Earl] Wiley*, and we do not now hold, that due process requires such a practice." *Elmer Wiley v Sowders*, 669 F2d 386, 389 (CA 6, 1982).

This Court opined in *People v Wise*, 134 Mich App 82, 97; 351 NW2d 255 (1984), "Even if the evidence is overwhelming, defense counsel will often not be allowed to argue the functional equivalent of a guilty plea *to the highest possible charges* absent any evidence on the record that defendant consented to this tactic." (Emphasis added.) This Court held that "arguing

that the defendant is merely guilty of the lesser offense is not ineffective assistance of counsel." *Id*. at 98.

Here, there was nothing on the record indicating that defendant consented to his counsel's tactic. Counsel stated on the record that he thought the best strategy would be to ask for a conviction on the lesser offenses of second-degree murder or involuntary manslaughter rather than risk a conviction of first-degree murder. Defense counsel stated on the record that defendant was convicted of first-degree murder in his first trial, one of the alibi witnesses could not place defendant away from the scene of the murder, and defendant gave an inculpatory statement to police.

Therefore, an alibi defense was foreclosed, and defense counsel was conceding the inevitable by agreeing that defendant gave an inculpatory statement. Simon testified that defendant gave a statement and defendant's signed statement was admitted into evidence. By defense counsel agreeing that defendant gave the statement, he was also buttressing his lesser offense argument because, in the statement defendant gave Simon, defendant explained that he just "started shooting." He stated, "I was – I was just shooting. I didn't mean for anyone to get hurt. I'm sorry." Such statements would make a finding of premeditation and deliberation less probable. Consequently, defendant has not overcome the presumption that his counsel engaged in sound trial strategy, and therefore, defendant was not denied the effective assistance of counsel.

Defendant's last argument on appeal is that the prosecution failed to meet its burden of showing that reasonable, good-faith efforts were made to locate witnesses James Robinson and Eugene Fisher. We disagree. This Court reviews a trial court's determination to admit evidence for an abuse of discretion and its findings of due diligence for clear error. *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *Babcock*, *supra* at 269.

Prior recorded testimony is admissible under MRE 804(b)(1) if a witness gave testimony in a former proceeding and the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony, and the witness is unavailable. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). A witness is unavailable under MRE 804(a)(5) if the proponent of the testimony has been unable to procure the witness's attendance by reasonable means and has shown due diligence to locate the witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). "The test is one of reasonableness and depends on the facts and circumstances of each case." *Id*.

The record in the instant case does not indicate that Robinson and Fisher were difficult to locate for the first trial, and the prosecutor did not have reason to know in advance that they would be difficult to locate. The police only learned of Fisher's reluctance to come to court when they initially attempted to locate him for the second trial. The prosecution started its efforts to locate both witnesses approximately one month before the second trial, and the police efforts to locate them were reasonable and in good faith. Simon served subpoenas on individuals in the witnesses' households. Simon placed follow up calls to both witnesses' homes and visited the witnesses' homes on two occasions while she was working the midnight shift. Consequently,

the court did not err by finding due diligence, and it did not abuse its discretion by allowing the prior testimony of Fisher and Robinson to be read to the jury.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood