STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2004
v	No. 238184 Wayne Circuit Court
MARIO EVANS, Defendant-Appellant.	LC No. 01-003572

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the murder conviction and forty to sixty months' imprisonment for the felon-in-possession conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

On appeal, defendant argues that he was denied the effective assistance of counsel. Because this Court denied defendant's motion to remand this case to the lower court for a *Ginther*[1] hearing, our review of this issue is limited to errors apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

We will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome."' *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland, supra* at 694. Effective assistance of counsel is presumed, and

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

the defendant bears a heavy burden of proving otherwise. *Carbin, supra*; *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first claims that he was denied the effective assistance of counsel because defense counsel failed to move to suppress his custodial statement and the lineup identification on the ground that they were illegally obtained during an unreasonable prearraignment delay. We disagree.

"A delay of more than forty-eight hours between an arrest without a warrant and a probable cause arraignment shifts the burden to the government to show the existence of a bona fide emergency or other extraordinary circumstances." *People v Manning*, 243 Mich App 615, 631; 624 NW2d 746 (2000), citing *Riverside Co v McLaughlin,* 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991). "Absent such a showing, the delay is unreasonable per se under the Fourth Amendment." *Id.* Nevertheless, such a delay does not necessarily require the suppression of statements obtained while a person is in police custody during the delay. *Manning, supra* at 631-632, 643. Instead, the proper analysis is whether the accused's statement was obtained voluntarily as determined by the factors listed in *People v Cipriano,* 431 Mich 315, 333-334; 429 NW2d 781 (1988), and unreasonable delay before arraignment is only one of the factors that should be considered in determining whether a defendant's custodial statement was voluntary. *Id.*; *Manning, supra* at 634-635, 643.

In this case, the prosecutor does not dispute that defendant was held for over forty-eight hours before defendant made the statement introduced at trial. In fact, defendant was detained for over ninety-three hours before he made his inculpatory statement and the record indicates that a magistrate issued an arrest warrant based on probable cause more than seven days following defendant's arrest. Therefore, a judicial determination of probable cause was made well outside the forty-eight hour requirement set forth in *Riverside, supra*. Although plaintiff contends on appeal that the delay was justified, the record reveals that during the delay the police were attempting to locate persons to verify defendant's initial exculpatory statements concerning an unrelated homicide and to locate an eyewitness to identify defendant in a lineup in this case. These circumstances do not constitute extraordinary circumstances to justify the unreasonable delay. Rather, a delay for the purpose of gathering additional evidence to justify an arrest constitutes an unreasonable delay. *Riverside, supra* at 56-57; *Manning, supra* at 630.

However, our analysis does not end here; rather, "[w]hen a confession was obtained during an unreasonable delay before arraignment, in Michigan the *Cipriano* factors still must be applied." *Manning, supra* at 643. According to the *Cipriano* Court, the test of voluntariness is whether, "considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Cipriano, supra* at 333-334 (internal quotations and citation omitted). In *Cipriano, supra*, our Supreme Court set forth the following nonexclusive list of factors to consider in determining whether a statement is voluntarily made:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length

> of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]
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> In *Manning, supra*, this Court explained:
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> > In engaging in the balancing process that *Cipriano* outlines, a trial court is free to give greater or lesser weight to any of the *Cipriano* factors, including delay in arraignment. A trial court cannot, however, give preemptive weight to that one factor . . . . To do so is to adopt a rule of automatic suppression of a confession obtained during the period of delay, a result that is directly contrary to *Cipriano* and that … *Riverside Co* [does not require]." [*Id.* at 643.]

However, "[t]he longer the delay, the greater the probability that the confession will be held involuntary." *Manning, supra*. Although this Court has recognized "the possibility that in some situations the length of the delay alone may be a sufficient ground to suppress a defendant's statement, particularly where the delay is so inexplicably long that it raises an inference of police misconduct," *id.* at 645, we do not find this to be such a case.

Here, examining the totality of the circumstances, we conclude that the evidence demonstrates that defendant voluntarily provided his statement to the police. Significantly, the record indicates that defendant was apprised of and understood his *Miranda*[2] rights on at least two occasions before he confessed and he spoke willingly to the police. On both occasions, after the officer advised defendant of his rights, defendant acknowledged that he understood those rights by placing his initials next to each right and signing the constitutional rights form. According to the officer, defendant never expressed any hesitation about talking about the shooting and did not request to speak with a lawyer. The record indicates that defendant had prior experience with the police because he was convicted of second-degree home invasion in 1998, receiving and concealing stolen property over $100 in 1999, and attempted carrying a concealed weapon in 1997, and thus, defendant was familiar with *Miranda*. The record does not indicate that defendant was intoxicated, in ill health, under the influence of drugs or deprived of food, sleep, or water when he gave the statement. To the contrary, officer testimony indicated that defendant was awake and alert and did not complain about lack of sleep when he gave his statement. Nor did defendant appear to be under the influence of drugs or alcohol. The record does not indicate that defendant was threatened with abuse or uneducated, illiterate or unintelligent. Defendant was approximately twenty years old when he confessed and he had obtained a GED. Although there is evidence that the police engaged in repeated questioning before defendant gave his statement, there is no evidence that he was subjected to continuous interrogation or to intimidating police conduct.

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In sum, we find, under the totality of the circumstances, defendant's decision to make an inculpatory statement was voluntary, i.e., the product of a free and deliberate choice, notwithstanding the unreasonable prearraignment delay.[3] *Cipriano, supra* at 333-334; *Manning, supra* at 643. Because we find that defendant's statement was voluntary, defense counsel was not ineffective for failing to move to suppress it. Defense counsel was not required to bring a frivolous or meritless motion.[4] *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant further claims that defense counsel was ineffective because he failed to move to suppress the lineup identification as a product of the unreasonable delay. We disagree.

Although the lineup identification occurred approximately eighty-one hours following defendant's arrest during what we find was an unreasonable delay, defendant failed to establish that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *Strickland, supra* at 694; *Toma, supra* at 302-303. Even if trial counsel had "move[d] to suppress the lineup identification" as defendant now claims his counsel should have done, it is unlikely that such a motion would have been successful. The eyewitness had made a statement to the police on the day of the shooting, and thus the eyewitness' identity was known to the police before defendant's arrest. In light of this circumstance, the eyewitness would have identified defendant despite defendant's unlawful detention. Because the eyewitness identification of defendant was inevitable, it is not evidence that would not have been discovered but for the direct procurement of evidence from an unlawfully detained person. See *People v Lewis*, 168 Mich App 255, 262-263; 423 NW2d 637 (1988), citing *People v Mallory*, 421 Mich 229, 240-241; 365 NW2d 673 (1984). In addition, the eyewitness' testimony concerning the incident largely corroborated defendant's statement, which, as discussed *supra*, was voluntary and admissible. Accordingly, defendant has failed to establish his claim of ineffective assistance of counsel.

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[3] Although the prosecution supports its argument with citation to a *Walker* hearing transcript, see *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), it is not clear from the lower court record whether defendant moved to suppress his statements to the police relative to this case, whereas it is clear that a motion was made in an unrelated case (*People v Evans*, Docket No. 240357). In the event that the *Walker* hearing was undertaken with respect to the instant case also, we agree with the trial court's ruling that defendant's statements to the police were voluntary.

[4] To the extent that defendant's ineffective assistance of counsel claim arguably could be based on counsel's failure to move for suppression of defendant's statement as the fruit of an illegal arrest, defendant is still entitled to no relief. On this Court's own motion pursuant to MCR 7.216(A)(5) and in light of *People v McKinney*, 251 Mich App 205; 650 NW2d 353 (2002), vacated 468 Mich 926; 663 NW2d 469 (2003), this case was remanded to the trial court for "further fact-finding regarding the issue whether defendant's statements should have been suppressed as the product of an illegal arrest." After an evidentiary hearing, the trial court determined that probable cause to make the initial arrest existed. Because the a fair-minded person of average intelligence would be justified in believing that the suspected individual had committed the felony, *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), we agree that there was probable cause for an arrest, and thus the statement was not the fruit of an illegal arrest.

Defendant next claims that he was denied the effective assistance of counsel due to defense counsel's failure to move to obtain an expert witness on identification or to seek a cautionary instruction on the dangers of misidentification. We disagree.

"[O]ther than psychiatric experts, a defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the expert." *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1997), citing MCL 775.15; see also *People v Jacobsen*, 448 Mich 639; 532 NW2d 838 (1995). An error that deprives an indigent defendant of the appointment of an expert constitutes reversible error only "if defendant was prejudiced and received a fundamentally unfair trial as the result of not having expert assistance." *Leonard, supra* at 583.

In the present case, defendant failed to establish that the outcome of the trial would have differed had an expert testified regarding the fallibility inherent in eyewitness identification. In his statement, defendant admitted to participating in the shooting. The identification evidence corroborated defendant's statement by placing him at the scene of the crime. Thus, even if an expert testified regarding the fallibility inherent in eyewitness identification, defendant implicated himself by his own statement. Furthermore, defense counsel competently attacked the eyewitness' identification through cross-examination by eliciting testimony that it was dark outside at the time of the shooting and concerning the perpetrator's description. Defense counsel then attacked the eyewitness' identification by arguing in his closing argument that his description of the perpetrator also fit the description of Fred Bishop, who defendant implicated as the shooter in his statement, and that the dark conditions might have caused him to misidentify the person he observed fire the shotgun. Further, at the conclusion of trial, the trial court instructed the jury on witness credibility and identification, informing the jury of the proper considerations in determining whether to accept or reject the eyewitness identification. These considerations included, among others, how long the witness observed the offender, how far away from the scene the witness was located, how well the area was lighted, and the circumstances at the time of the identification. Under these facts, we find that defendant's trial, without expert testimony regarding the fallibility of eyewitness identifications, was not fundamentally unfair, *Leonard, supra* at 582, and that the jury was sufficiently informed of the proper considerations in determining whether to accept or reject eyewitness identification, *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996), adopting certain findings of the vacated decision *People v Carson*, 217 Mich App 801, 807; 553 NW2d 1 (1996). Defendant has not shown that counsel's assistance was deficient.

Finally, defendant argues that a mandatory life sentence, without the possibility of parole, is a determinate sentence that violates the indeterminate-sentence principle of article 4, § 45, of the Michigan Constitution. We disagree.

This Court already has rejected this argument. In *Snider, supra*, we determined that "there is nothing in Const 1963, art 4, § 45 requiring indeterminate sentencing for particular crimes, such as [the defendant's] first-degree premeditated murders." *Id.* at 426-427; *People v Cooper*, 236 Mich App 643, 660-664; 601 NW2d 409 (1999). Thus, defendant's argument is without merit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White