STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
v	No. 248743 Wayne Circuit Court
CHARLES MASON ALLEN, Defendant-Appellant.	LC No. 02-005203-01

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to a prison term of eighteen to forty years. He appeals as of right. We affirm.

Defendant's conviction arises from his alleged involvement in the October 6, 1990, shooting death of Niambi Kumasi. Alvin Smith testified that, in October 1990, he was "selling drugs" out of his Manor Street house in Detroit, and learned from his customers that neighborhood rival drug dealers were "undercutting" him by selling drugs at a lower price. He indicated that, on October 3, 1990, between 11:30 and 11:45 p.m., he and two associates went to the rival drug dealers' house, located at 20007 Meyers, and, after confirming that no one was in the house, they "[s]hot it up." Smith and his two associates fled in Smith's white Mercury Cougar.

In a statement made to the police, defendant confirmed that, in October 1990, he was selling drugs out of the Meyers house with Robert Issac (a/k/a "Mack"). Mack's associates included Phillip Whitfield, Nate Jennings, and Ronald Williams. Defendant stated that he was not at the Meyers house when the shooting occurred, but a neighbor told him that three people had "shot it up." Defendant called Mack, whom he "work[ed] for," and told him what happened. In response, Mack told defendant that he saw the shooting, that he and Nate tried to return fire as the perpetrators were leaving, and that "we'd get with them in time."

Smith testified that, between 11:00 p.m. and midnight, he was at his Manor home with several associates, including the victim. They heard a knock on the door and, as one of Smith's associates went to answer it, shots were fired into the house. Smith estimated that "at least" forty bullets were fired into the home. Smith attempted to return fire. According to medical evidence, the victim was shot three times, including a fatal shot by a high-powered bullet that struck her skull.

Defendant stated that, when he heard the gunshots, he remarked to his friends "that's probably Mack shooting up the place." Shortly after the shooting stopped, defendant went to Phyllis Weiss'[1] house to use the phone. After leaving Weiss' house, defendant rode down Manor, saw the police, and told his friends "we hit them," and that he "thought Mack and them did it."

Weiss testified that, on October 6, 1990, she allowed defendant to use her phone several times throughout the day. At approximately 10:30 p.m., while defendant was on the phone, Weiss heard him say, "He found out, we're going to take care of it." She further indicated that, ten to fifteen minutes after the shooting, defendant came to her house, "out of breath," "telling [her] to hurry up and open the door and let him in." Defendant used her phone, and she heard him say, "It's been taken care of."

Defendant first argues that he was denied his constitutional right to a speedy trial because the prosecution delayed his trial for eleven years. We disagree.[2]

Defendant was arrested on October 8, 1990, on an unrelated drug charge. At that time, he was not charged with second-degree murder. Defendant made a statement to the police in this case on October 10, 1990. Subsequently, defendant was offered immunity from charges in this case in exchange for his testimony against Whitfield, Jennings, and Isaac, who had been charged with first-degree murder in connection with the victim's death. On November 3, 1990, defendant was arraigned on the drug charge, and a preliminary examination was held on November 15, 1990. At the preliminary examination of Whitfield, Jennings, and Isaac, defendant invoked his Fifth Amendment privilege not to testify, and was thereafter released from custody. Defendant then left Michigan. On June 19, 1991, a felony warrant was issued for defendant's arrest for second-degree murder. In May 2001, the Alliance Fugitive Task Force learned about defendant's whereabouts, and obtained a federal Flight to Avoid Prosecution Warrant. On February 8, 2002, FBI agents arrested defendant in Georgia. On April, 25, 2002, defendant was arraigned on the second-degree murder charge, and his trial commenced on March 26, 2003.

A criminal defendant has a constitutional and statutory right to a speedy trial. "In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (citations omitted).

The first factor, the length of delay, does not favor a finding of a speedy trial violation. Defendant contends that the length of delay was eleven years. But defendant's calculation is

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[1] Weiss lived on Meyers, about five houses down from defendant.

[2] We note that, throughout his brief, defendant improperly relies on documents that are not part of the lower court record. We decline to consider those items. Appeals are heard on the original record, MCR 7.210(A)(1), and it is impermissible to expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

based on a misunderstanding of the applicable law. He improperly calculates the delay from the issuance of the felony arrest warrant until the trial. But "[a] formal charge against, or restraint of, the accused is necessary to call the right to speedy trial into play." *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987). The total time between defendant's arrest and the trial was less than fourteen months. "A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice." *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999).

With respect to the second factor, in assessing the reasons for the delay, this Court must examine and attribute each period of delay to either the prosecution or the defendant. See *People v Gilmore*, 222 Mich App 442, 460-461; 564 NW2d 158 (1997). After defendant was arraigned, trial was scheduled to commence on June 26, 2002. Noting that the offense had occurred several years previously, the prosecutor moved for an adjournment to obtain certain documents and transcripts, which the trial court granted. The transcripts and records were apparently obtained in November 2002. Defense counsel thereafter requested an adjournment to review the transcripts, which the trial court granted. Although there were reasons for additional delays, those periods were not significant. Ultimately, the trial commenced on March 26, 2003. Under the circumstances, this factor does not weigh against either defendant or the prosecution.

With respect to the third factor, the assertion of the speedy trial right, this Court looks at when the defendant asserted the right and when trial took place in relation to the assertion. See *Cain, supra* at 113-114. As previously indicated, defendant failed to timely assert his right to a speedy trial, which "weighs against a finding that he was denied a speedy trial." *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

With regard to the fourth factor, there are two types of prejudice: prejudice to the person and prejudice to the defense. *Gilmore, supra* at 461-462. Defendant does not argue that his incarceration during the delay prejudiced his person. *Id*. at 462 (prejudice to the person consists of the deprivation of a defendant's civil liberties).

Prejudice to the defense must meaningfully impair a defendant's ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998). Here, there is no indication that the delay adversely affected defendant's ability to defend the charge. Defendant's general assertions of possible prejudice are insufficient to show that his defense was affected. See *Gilmore, supra*. Defendant notes that "the victim's boyfriend who was sitting right next to her at the time of the shooting, who immediately thereafter fled the scene, had since died." But defendant has failed to indicate what beneficial testimony this witness would have offered.

Defendant also notes that the "only person to testify about [his] involvement . . . was Phyllis Weiss who, by the time of [his] trial twelve years later, was no longer a crack addict like she was at the time of the offense." But this claim is misplaced because, for purposes of a speedy trial violation, the time does not commence on the date of the offense. *Rosengren, supra*. Nonetheless, Weiss' status as a crack addict in 1990 was plainly before the jury. Moreover, in arguing this issue, defendant simply ignores his inculpatory, detailed, eight-page statement, admitting his part in the offense. Indeed, in light of defendant's own admissions, it is highly improbable that the outcome of the proceedings would have been different if Weiss was a crack addict when she testified at defendant's trial. In short, defendant has failed to show that any

potential witness favorable to the defense, or other exculpatory evidence was lost due to the delay in bringing defendant to trial. Consequently, defendant's claim of prejudice to his defense lacks merit.

In sum, when balancing the relevant factors, defendant's right to a speedy trial was not violated. Therefore, this claim does not warrant reversal.

Next, defendant argues that there was insufficient evidence to convict him of second-degree murder, because there was no evidence of malice. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998) (citation omitted).

Defendant only challenges the jury finding that he acted with malice. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, *supra* at 464. Malice can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). "Malice may also be inferred from the use of a deadly weapon." *Id*. A defendant need not personally use the weapon for the jury to infer malice. *Id.* at 760.

Evidence showed that, after defendant's drug house was shot up, Mack, one of defendant's superiors, told him that the culprit drove a white Cougar, that they returned fire on the car as it was leaving, and that "we'd get with them in time." Defendant admitted that Mack told him to "find out where they live[d]." In addition to defendant's own admissions, Weiss heard defendant say that "he wanted to find out who it was that had done it," and that "it was someone driving a white Cougar." As a result of his asking around, defendant learned the driver's name. He later saw the white Cougar, had a brief altercation with the driver, and, after the car left, followed the car to obtain its destination. By his own admission, after learning where the driver resided, defendant said, "they were going to get theirs." Defendant called Whitfield, who is "Mack's partner," and reported the driver's name, and that he "found out" his location. Although Whitfield told defendant that he would call Mack, defendant admitted that he also called Mack and told him the driver's location. Defendant subsequently saw Williams, another of Mack's associates, and also told him that he "found out" where the driver lived. Defendant admitted that he got into the car with Williams and "pointed out the house to him." At the time, the white Cougar was still in the driveway. Defendant admitted that Williams immediately called Mack, and said he "knows where the spot is." Weiss subsequently heard defendant say "[h]e found out, we're going to take care of it."

There was evidence that Smith's house was subsequently shot up, during which the victim was killed. Defendant admitted that, from a friend's house, he heard the gunfire and remarked "that's probably Mack shooting up the place." Additionally, after the shooting, a witness heard defendant say, "It's been taken care of." Defendant admitted that he subsequently rode past the house and, after seeing the police cars, said to his companions, "we hit them." Additionally, by his own admission, defendant knew that Mack and his associates had shot up other places in the past, with the most recent being "about four months" before this incident, and believed that someone had been killed during one of the incidents. Defendant also admitted his awareness that Mack owned "a chrome three fifty-seven, an AK, a twelve gauge pump, and an AR15." An officer testified that an AK and AR are "high-powered, semi-automatic rifles."

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant acted with malice. *Goecke*, *supra*. Contrary to defendant's suggestion, his conduct before, during, and after the incident was clearly sufficient to enable the jury to find, beyond a reasonable doubt, that he set in motion a force likely to cause death or great bodily harm, which was sufficient to establish the requisite malice. *Carines*, *supra* at 759-760. Although defendant asserts that evidence supporting his involvement was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). In sum, the evidence was sufficient to sustain defendant's conviction of second-degree murder.

Defendant also argues that the trial court clearly erred by denying his motion to suppress his statement to the police. Defendant asserts that his statement was induced by the denial of counsel and coercion. We disagree.

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights under *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

The trial court did not clearly err by finding that defendant was not denied counsel, or that his statement was otherwise involuntary. Defendant, as well as the officer who took his statement, testified at an evidentiary hearing regarding the interrogation and the statement. Defendant and the officer presented contradictory testimony regarding defendant's alleged request for an attorney. The officer testified that defendant never asked to speak to an attorney, while defendant testified that he asked to talk to an attorney. Defendant does not dispute that he was advised of his *Miranda* rights before he was questioned, indicated that he understood those rights, and signed a written waiver of his rights.

The trial court considered the largely contradictory testimony of defendant and the officer and, concluding that defendant's account was not credible, determined that defendant did not

request an attorney and that his statement was voluntary. Viewing the totality of the circumstances, the trial court did not clearly err in finding that defendant's statement was voluntarily given.

Next, defendant contends that he was denied a fair trial by two instances of prosecutorial misconduct. We disagree. This Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor's conduct below,[3] this Court reviews his unpreserved claims for plain error affecting substantial rights. *Carines*, *supra* at 763-764. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

First, defendant makes a general claim that the prosecutor asserted an improper argument that defendant left the state because of the murder charge. Defendant contends that, in making this improper assertion, the prosecutor impermissibly presented the testimony of two law enforcement officers concerning the circumstances of defendant's 2002 arrest in Georgia, which "was irrelevant and highly prejudicial and without support in either fact or law." According to the police testimony, in 2001, Alliance Fugitive Task Force members learned about defendant's whereabouts, and obtained a federal warrant. FBI agents subsequently located and arrested defendant. At the time, defendant was hiding in a closet and, once pulled out, struggled with the officers, and denied being Charles Allen.

Defendant has not demonstrated plain error affecting his substantial rights. Before trial, the parties and the trial court discussed what evidence concerning the twelve-year delay between the offense and the trial was admissible. After hearing arguments, the court limited the testimony to the fact that defendant was arrested in Georgia, found at a home, and gave an alias during his apprehension. On appeal, defendant does not challenge the basis of the trial court's ruling, and has failed to cite any support for his claim that police testimony was irrelevant, MRE 401, or unduly prejudicial, MRE 403. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Further, we reject defendant's general claim that, in making the allegedly improper implication, the prosecutor engaged in misconduct by proffering testimony that defendant contends was prejudicial and inadmissible. Contrary to defendant's suggestion, although a prosecutor may not argue the effect of testimony that was not entered into evidence at trial, she may argue reasonable inferences from the evidence that was admitted during trial. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

[3] In his brief, defendant states that "there was some objection or interruption by the defense to the misstated evidence," but also states that "defense counsel did not formally object to the prosecutor's misconduct regarding the evidence of flight and vouching for a witness."

Defendant also contends that, during closing argument, the prosecutor impermissibly mischaracterized the evidence when she stated that defendant made "attempts to escape detection by false identity." Defendant appears to argue that the prosecutor improperly argued facts not in evidence.

Although a prosecutor may not argue facts not in evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), this unpreserved issue does not warrant reversal. The FBI agent testified that the agents had information that defendant had used two aliases. He further testified that, when they apprised defendant that they were looking for Charles Allen, his demeanor was "[b]asically, like it wasn't him." The agent explained that defendant's reaction was the "equivalent of, I don't know what you're talking about, it's not me." Although the agent did not specifically testify that defendant gave an alias when he was arrested, the prosecutor's remark that defendant attempted "to escape detection by false identity" was a fair inference from the evidence. *Fisher*, *supra*.

To the extent the prosecutor's remarks could be considered improper, they involved only a brief portion of her closing argument, and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Any prejudice that may have resulted could have been cured by a timely instruction. *Schutte*, *supra*. Indeed, the trial court instructed the jurors that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

We also reject defendant's claim that the prosecutor impermissibly vouched for Weiss by asking her the following question during direct examination:

> *Q*. After this gunfire and the evidence that you've just described to this jury, *do you have any reason to sit here and lie* on [defendant]?
>
> *A*. No, ma'am.

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But by simply asking the question, the prosecutor did not convey to the jury that she had special knowledge that Weiss was testifying truthfully. Rather, after Weiss gave testimony regarding defendant's conduct that she witnessed, the prosecutor simply asked a question that, at best, allowed Weiss to vouch for her own credibility. Defendant has failed to cite any support for his claim that the prosecutor's question was improper. *Watson*, *supra*. Accordingly, this claim does not warrant reversal.

We also reject defendant's claim that defense counsel was ineffective for failing to object to the unpreserved claims of errors discussed above and for failing to "impeach" Weiss. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In light of our conclusion that these claimed errors did not affect defendant's substantial rights, i.e., were not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Id.* Therefore, he cannot establish a claim of ineffective assistance of counsel. Defendant is not entitled to a new trial.

We also reject defendant's final claim that he is entitled to resentencing because his eighteen-year minimum sentence is disproportionate.[4] This Court reviews sentencing decisions for an abuse of discretion. A sentence constitutes an abuse if discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence that falls within the judicial guidelines recommended range is presumptively proportionate. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Because defendant's eighteen-year minimum sentence is within the guidelines recommended range of ten to thirty years, it is presumptively proportionate. *Id.* Although a sentence within the guidelines range could be disproportionate, *Milbourn, supra* at 661, defendant has failed to demonstrate any unusual circumstances to overcome the presumption of proportionality. Defendant is not entitled to resentencing.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray

[4] Because the offense of which defendant was convicted occurred before January 1, 1999, the judicial sentencing guidelines apply to this case. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).