STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2008
v	No. 277812 Wayne Circuit Court
NORRIS NAVAN JOHNSON, Defendant-Appellant.	LC No. 06-012163-01

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life in prison, for the first-degree murder conviction, and two years in prison, for the felony-firearm conviction. We affirm.

This prosecution arises from a shooting that killed Wieslaw Bielski on Freer Street in the city of Detroit. Defendant and an unarmed man approached Bielski in the street. Jose Barba testified that he witnessed defendant pointing a gun at Bielski's chest, and that within the following one to three minutes, the unarmed man warned Bielski to "go because he's got a weapon." Barba further testified that Bielski began to escape, but defendant and the unarmed man followed and he observed defendant fire two shots, one of which penetrated Bielski's chest and killed him. An assistant medical examiner examined Bielski's body, and determined that the manner of death was homicide. One gunshot entered Bielski in the middle of his chest, and exited his lower back. Later, Barba and another eyewitness, Leticia Hernandez, separately identified defendant from a photograph array.

Defendant's first argument on appeal is that the prosecution failed to present legally sufficient evidence of premeditation and deliberation to support his first-degree murder conviction. We disagree. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Therefore, this Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

"The elements of first-degree murder are that the defendant killed the victim and that the killing was 'willful, deliberate, and premeditated. . . .'" *People v Bowman*, 254 Mich App 142,

151; 656 NW2d 835 (2002) (citation omitted). The defendant must also have had the specific intent to kill. *People v Graham*, 219 Mich App 707, 710-711; 558 NW2d 2 (1996). To show premeditation and deliberation, "'some time span between [the] initial homicidal intent and ultimate action is necessary . . . .'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), quoting *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). The interval between the initial thought and ultimate action should be long enough to afford the defendant time to take a second look. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

Defendant's pursuit of Bielski, following the unarmed man's initial warning, is credible evidence that defendant had time to take a second look. *Abraham, supra* at 656. In addition, a defendant's evasive conduct following a murder, supports an inference of premeditation and deliberation. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Another witness saw teenagers, similar in height to defendant and the unarmed man, rushing across Michigan Avenue after the shooting. Defendant's quick exit from the scene, following Bielski's murder, is consistent with premeditation. Consequently, we conclude that the evidence was sufficient for a rational jury to conclude that defendant killed Bielski, with premeditation and deliberation.

Defendant's second argument on appeal is that his federal and state constitutional right to counsel was infringed, because his appointed counsel was ineffective. We disagree. Defendant did not present this issue to the trial court, so this Court's review is limited to mistakes that are apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The trial court must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485.

Effective assistance of defense counsel is strongly presumed. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prevail on a such a claim, the defendant must show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment, *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993), or under the Michigan Constitution, *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994). In other words, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a heavy burden on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "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 claims that his trial counsel was ineffective, because he failed to move to suppress the identifications of him by Barba and Hernandez, in two photographic arrays. He claims the procedure in the arrays was suggestive, because defense counsel was not present. He

further claims that trial counsel should have moved to suppress Barba's and Hernandez's subsequent in-court identifications, for lack of an independent basis. He also claims that trial counsel was ineffective because he failed to move for a live lineup.

An identification procedure results in a deprivation of defendant's liberty without due process of law when it is "unnecessarily suggestive and conducive to irreparable misidentification." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). "In order to challenge an identification on the basis of lack of due process, 'a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.'" *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993).

There is no federal sixth amendment[1] right to counsel for a photographic array conducted for investigative purposes. *Kurylczyk, supra* at 297-298. Rather, the right to counsel attaches only at the initiation of adversarial judicial criminal proceedings, such as by formal charge, a preliminary hearing, an indictment, an information, or an arraignment. *Rothgery v Gillespie Co, Texas*, ____ US ____, ____; ____ S Ct ____; ____ L Ed 2d ____ (2008)[2]; *People v Hickman*, 470 Mich 602, 603-604, 607; 684 NW2d 267 (2004).

On September 22, 2006, the prosecuting attorney signed a recommendation form, recommending the issuance of a warrant for defendant's arrest. On this form, a box was checked indicating that Johnson was not in custody. The information is dated September 23, 2006. Also on September 23, 2006, the magistrate signed a felony warrant for defendant's arrest. This suggests that on September 23, 2006, the date charges were brought, defendant was not yet in custody.[3] Because adversarial proceedings had not yet begun at the time of the photographic

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[1] The federal sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." US Const, Am VI.

[2] Recently, in *Rothgery*, the United States Supreme Court held that the sixth amendment right of the "*accused*" to assistance of counsel in "all criminal *prosecutions*" is limited by its terms: it does not attach until a prosecution is commenced. *Rothgery, supra* at ____ (citations omitted; emphases added.) For purposes of the right to counsel, the Supreme Court "pegged commencement of a 'prosecution' to the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id*. at ____ (citations omitted). "The rule is not mere formalism, but a recognition of the point at which the government has committed itself to prosecute, the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id*. at ____ (citations and internal quotation marks omitted). The holdings of *Rothgery* are: (1) a criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary proceedings, triggering the attachment of his sixth amendment right to counsel; and (2) attachment of the right to counsel does not also require that the public prosecutor, as distinct from a police officer, be aware of that initial proceeding or be involved in its conduct. *Id*. at ____.

[3] On September 29, 2006, according to the bond history in the lower court's register of actions,
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arrays, the right to defense counsel had not yet attached because the right to counsel had not yet attached, the failure to provide counsel, at the photographic array, did not result in a deprivation of defendant's liberty without due process of law. Accordingly, trial counsel was not ineffective by failing to move to suppress the identifications at the photographic array on the basis that they were suggestive.

Moreover, there was an independent basis for the in-court identifications of defendant. *Williams, supra* at 542-543 (evidence concerning the identification is inadmissible at trial unless an independent basis for in court identification can be established that is untainted by the suggestive pretrial procedure). We consider eight factors to determine if an independent basis exists: (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of the observation, lighting, noise and proximity; (3) length of time between the offense and the disputed identification; (4) accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description; (5) any previous proper identification or failure to identify the defendant; (6) any identification prior to lineup or showup of another person as the assailant; (7) the nature of the alleged offense and the physical and psychological state of the victim; (8) any idiosyncratic or special features of the defendant. *People v Gray*, 457 Mich 107, 115-124; 577 NW2d 92 (1998).

The fact that Barba and Hernandez had no prior relationship with defendant, that they described defendant to Officer Tinsley (for a composite illustration) as a teenager when defendant is in his 20s, that Barba and Hernandez had not identified defendant prior to the photo array, and that nothing in the record suggests that defendant has idiosyncratic or special physical features, all weigh in defendant's favor in evaluating whether there was an independent basis for Barba and Hernandez identification of defendant as the shooter. However, other factors do support the conclusion that Barba and Hernandez had an independent basis for identification. A witness's opportunity for observation plays a significant role in the independent basis analysis. *Gray, supra* at 117. Although it was nighttime during the shooting, the street was well-lit by a street lamp. Barba testified that he and Hernandez sat approximately 20 feet away from the intersection where Bielski first encountered defendant and the unarmed man. He also testified that he paid close attention to defendant, because he held a gun. Furthermore, the incident exceeded one to three minutes, so Barba and Hernandez each had adequate time to observe defendant's participation in the murder.

In addition, the photographic arrays occurred within a month of the shooting, while the crime was still fresh in Barba's and Hernandez's minds. When Officer Jimenez canvassed the neighborhood of the shooting, defendant's longtime friend, Nathaniel Borck, reported that the composite illustration resembled defendant. Furthermore, defendant is between five feet, five inches and five feet, six inches tall, consistent with Barba's and Hernandez's estimation of his height.

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defendant was remanded. The register of actions also indicates that the arraignment on the warrant was conducted on September 29, 2006. The warrant recall is also dated September 29, 2006. The petition for a court-appointed attorney is also dated September 29, 2006.

Moreover, Barba and Hernandez had not previously failed to identify defendant, they had not identified another person as the shooter, and there is no evidence in the record that indicates Barba's and Hernadez's perceptions were distorted by their physical or psychological states to such an extent that they would not be able to identify defendant later.

On the basis of these factors, we conclude that there was an independent basis for the in-court identifications of defendant. Therefore, because a motion to suppress the photographic arrays and in-court identifications would have lacked merit, defense trial counsel's failure to make such a motion was not ineffective assistance of counsel. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Under most circumstances, a live lineup should be used if the defendant is in custody or may be compelled to appear for a corporeal lineup. *Kurylczyk*, *supra* at 298. In this case, defendant could not be compelled to appear in a lineup when the photographic array was conducted, because he had already been released from jail. Nevertheless, a trial court may, in its discretion, grant a defendant's motion for a lineup. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *Id.*

Here, defendant's identity as the man who pointed the gun at Bielski and subsequently shot him was material. However, there was no reasonable likelihood that Barba and Hernandez mistakenly identified defendant. Their contributions to the composite illustration of the gunman led to the identification of defendant by Borck. Moreover, when Officer Jimenez conducted the photograph array with Barba, he immediately recognized defendant from among six photographs. Although Hernandez was more hesitant to choose defendant, she testified that she would "never forget those eyes," and she recognized his forehead and hairline. Therefore, because there was no reasonable likelihood of mistaken identification that a lineup would tend to resolve, defendant's trial counsel's motion for such a lineup would have been meritless and futile, and the failure to make this motion was not ineffective assistance of counsel. *Ackerman, supra* at 455.

In addition, "this Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999). Here, trial counsel could legitimately have elected to forego a live lineup, in order to attack weaknesses in Barba's and Hernandez's identifications on cross-examination and in closing arguments. The failure of this strategy does not render trial counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 415-416; 639 NW2d 291 (2001).

Defendant also claims that his trial counsel was ineffective because he failed to move for a mistrial, or request a cautionary instruction, following Hernandez's testimony that she was afraid to testify. Hernandez explained that, after the preliminary examination, someone approached her in the court's hallway and frightened her.

A defendant's threat against a witness is generally admissible to demonstrate consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). It is also generally true that for such evidence to be considered, it must be connected to the defendant.

People v Lytal, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). However, evidence of threats is relevant to witness bias, when there is an indication that the witness was reluctant to testify against the defendant. *People v Johnson*, 174 Mich App 108, 112; 435 NW2d 465 (1989).

At trial, evidence that someone spoke to Hernandez following the preliminary examination, causing her to be afraid to testify, was not offered to demonstrate defendant's consciousness of guilt. Rather, it was offered to address Hernandez's credibility. During the first day of Hernandez's testimony, she was reluctant to answer the prosecutor's questions, and second-guessed her original observations of defendant, claiming she only saw shadows because it was dark outside. In contrast, on the second day of her testimony, she cooperatively recalled the events prior to the shooting, and identified defendant as the man who pointed a chrome weapon at Bielski. The testimony regarding the threat to Hernandez was proper to show her initial bias. Therefore, defendant's trial counsel's motion for a mistrial, based on this testimony, would have been meritless and futile, and the failure to make this motion was not ineffective assistance of counsel. *Ackerman*, *supra* at 455.

Moreover, assuming that defendant's trial counsel should have moved for a cautionary instruction regarding this testimony, there was no reasonable probability that, but for the error, the result of the proceeding would have been different. Hernandez's reference to the threat was nonspecific, and did not identify its source. Moreover, regardless of Hernandez's testimony, Barba identified defendant, in the photographic array and at trial, as the shooter, without hesitation. We conclude that defendant has failed to establish prejudice.

Finally, defendant claims that his trial counsel was ineffective because he failed to contact and subpoena alibi witnesses who attended the barbeque that defendant attended at the time of the shooting. The failure to call a particular witness at trial is presumed to be a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Trial counsel chose to limit alibi testimony to Borck's observations of defendant's presence at the barbeque, and did not call others who were present at the barbeque. Again, regardless of the success of this strategy, this Court will not substitute its judgment for that of trial counsel.

Defendant also requests that this Court remand his case for an evidentiary hearing regarding the ineffective assistance of his trial counsel. However, because defendant's request for remand is not accompanied by affidavits which support his alibi defense or articulate the facts that would be established at a *Ginther*[4] hearing as required by MCR 7.211(C)(1)(a), we reject defendant's untimely request.

Defendant also argues that the cumulative effect of his claims on appeal denied him a fair trial. To determine if a defendant received a fair trial, only actual errors are aggregated for their cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because we conclude above that defendant's trial counsel was not ineffective for failing to (1) move to suppress the identifications, (2) move for a live lineup, (3) move for a mistrial or request a

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

curative instruction following Hernandez's testimony, and (4) contact and subpoena additional alibi witnesses, no actual errors occurred.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder