

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOM MILES,

Defendant-Appellant.

UNPUBLISHED

May 1, 2003

No. 234681

Oakland Circuit Court

LC No. 00-175776-FC

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to mandatory life for the murder conviction and 20 to 40 years' imprisonment for the assault conviction, to be served concurrently, but consecutively to two years' imprisonment for the felony-firearm convictions. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to object to the pretrial identification procedures that the prosecution utilized on the basis that the procedures were unduly suggestive and unreliable, and thereby defendant was denied a fair trial. In essence, defendant asserts that the in-court identifications made by three witnesses to the shooting, which occurred approximately twenty-four years earlier, should not have been permitted without a showing of an independent basis for those identifications.

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel, and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

To establish that a pretrial identification procedure denied him due process, a defendant must show that it was so suggestive under the totality of the circumstances that it led to a

substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, his in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977).

In the present case, defendant has failed to identify any improper pretrial identification procedures that the prosecution used with respect to any of the three witnesses named by defendant. Defendant appears to challenge the fact that one witness indicated a more certain identification of defendant at trial than he did during pretrial proceedings. This challenge, however, is not an assertion of improper procedures, but rather concerns the weight to be accorded that witness' in-court identification. Moreover, with regard to defendant's challenges to the identification given by two other witnesses, defendant has failed to identify any error. Accordingly, because defendant failed to show that any pretrial identification procedure was so suggestive that it led to a substantial likelihood of misidentification, there was no need for the prosecution to show an independent basis for any of the three witnesses' in-court identifications. *Gray, supra; Kachar, supra*. As a result, defense counsel's failure to object to the identification procedures was not ineffective assistance because counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, to the extent that defendant claims that he was denied effective assistance because his counsel failed to challenge the disparity of certainty between a witness' in-court identification of defendant and that witness' uncertainty at the corporeal lineup, his claim is without merit because defense counsel appropriately raised this issue on cross-examination. Defendant has failed to demonstrate that his counsel failed to provide effective assistance. *Rockey, supra*.

Defendant next argues that he was denied a fair trial on the basis of ineffective assistance of counsel and prosecutorial misconduct because defense counsel failed to object to the prosecutor's improper closing remarks that relied on the testimony of two police officers that was inadmissible. Defendant's argument is without merit. The testimony at issue, that of two police officers concerning witnesses' prior identification of defendant as the offender was admissible under MRE 801(d)(1)(C), and thus no misconduct stems from the prosecutor's reference to that testimony during closing argument. Further, defense counsel need not make a meritless objection. *Snider, supra*. We find defendant's interpretation of *People v Malone*, 180 Mich App 347, 357; 447 NW2d 157 (1989), inapposite.

Next, defendant asserts that the prosecutor committed misconduct by presenting irrelevant and prejudicial testimony of a witness to bolster his theory of premeditated first-degree murder, and defendant appears to suggest that the trial court improperly admitted the challenged testimony. Because defendant has failed to cite any law in support of these assertions, he has abandoned this issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("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 with little or no citation of supporting authority."). Nonetheless, we note that defendant, having failed to demonstrate outcome-

determinative plain error with respect to this unpreserved issue, is entitled to no relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant next argues, in essence, that the trial court abused its discretion in permitting a witness to testify, under the excited utterance exception to the hearsay rule, that her then-boyfriend had stated that the person whom they just had seen shoot the victim was named Tom Miles. Again, we disagree.

“We review a trial court’s evidentiary rulings for an abuse of discretion. *Watson, supra* at 575. Pursuant to MRE 803(2), an excited utterance, defined as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” is not excluded by the hearsay rule, MRE 802.

The record reveals that when the challenged statement was made, the bar where the shooting took place “was a mad house, everyone screaming and yelling . . .” and crying and the declarant “was upset” and was attempting to unlock the back door to allow patrons to leave the bar. Under these circumstances, we cannot say that the trial court abused its discretion in determining that this statement was admissible under the excited utterance exception to the hearsay rule.

Defendant next argues that the evidence was insufficient to demonstrate the element of premeditation, which is required for a first-degree murder conviction. We disagree.

“Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *Kelly, supra* at 627. However, premeditation and deliberation may be inferred from all the facts and circumstances, *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993), and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient, see *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: “(1) the previous relationship between the defendant and the victim; (2) the defendant’s actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted.” *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

Here, evidence at trial showed that in the past defendant had argued with the victim, a bartender. At the time of the shooting, defendant argued with the victim because the victim refused to serve defendant another drink after “last call” and then defendant pulled out a gun and shot the victim in the chest. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find premeditation and deliberation beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Finally, defendant argues that the cumulative effect of the errors denied defendant his right to due process and a fair trial, and thus reversal is required. Having determined that no prejudicial error occurred, we find no basis for reversal. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999) (“Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found.”).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski
/s/ Karen Fort Hood