

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY EUGENE GROSS,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 252590

Wayne Circuit Court

LC No. 03-009154-01

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felony murder, MCL 750.316(1)(b), first-degree, premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to a mandatory life sentence for the felony murder conviction, a mandatory life sentence for the first-degree murder conviction, twenty-five to fifty years in prison for each assault with intent to murder conviction, and two years in prison for the felony-firearm conviction. This case arose when defendant, while carrying a gun, grabbed a man's wrist and demanded the man's watch; when the man broke free and dove inside the entrance of a club, defendant fired several shots into the crowd in the club's foyer, which wounded two victims and killed another. We affirm, but remand for amendment of defendant's judgment of sentence.

Defendant first argues that the trial court erred in denying his motion to suppress a witness's identification testimony. We disagree.

Issues of law relevant to a motion to suppress are reviewed de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004). On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Whether a corporeal lineup is suggestive must be determined according to the totality of the circumstances. *Kurylczyk*, *supra*, p 311-312. The defendant must demonstrate that given the totality of the circumstances, the procedure used was so impermissibly suggestive that it created a substantial likelihood of misidentification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). Relevant factors include: (1) the witness's opportunity to view the criminal during the offense, (2) the

witness's degree of attention, (3) the accuracy of a previous description, (4) the extent of the witness's certainty at the pretrial identification procedure, and (5) the amount of time between the offense and the confrontation. *Id.*, pp 304-305.

The trial court did not err in concluding that the lineup was not impermissibly suggestive. The witness had the opportunity to view defendant at the time of the crime. She testified that she clearly observed defendant's face at the time of the incident. Her recall was sufficient to assist police in making a composite sketch of the suspect. Although the lineup was conducted several months after the incident, the witness was able to identify defendant in a lineup "very quick[ly]." Under the totality of the circumstances, defendant has failed to show that there was a substantial likelihood of misidentification.

Defendant contends the lineup was impermissibly suggestive because he was the only person in the lineup with light colored eyes. However, physical differences between a suspect and other lineup participants are not impermissibly suggestive by themselves. *Kurylczyk, supra*, p 312. Differences among participants are significant only if they are apparent to a witness and substantially distinguish a defendant from other lineup participants. Only then is there a substantial likelihood that differences among lineup participants, rather than the defendant's appearance, was the basis of the witness's identification. *Id.*, p 312. The witness testified she did not notice that defendant's eye color was different from anyone else's in the lineup, and she identified defendant according to what she recalled from the shooting. Physical differences between the other participants and the defendant affect the weight given to the identification rather than its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).¹

Defendant's second argument is that the court erred when it did not sua sponte exclude other acts evidence. We disagree.

Because defendant did not challenge the introduction of the evidence, our review is limited to whether its admission constituted plain error that affected defendant's substantial rights. Reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant, or it seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, all relevant evidence is admissible unless otherwise provided by law, and evidence that is not relevant is not admissible. *Aldrich, supra*, p 114; MRE 402. Relevant evidence is evidence that tends to make the existence of any material fact more probable or less probable than it would be without the evidence. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). "[R]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence." *Aldrich, supra*, p 114, citing *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000).

¹ Defendant also contends that the police made impermissibly suggestive comments when they told the witness before the lineup that a possible suspect was extradited from another state and that she needed to view a lineup. This Court has held that the fact that a victim is told that a suspect is in a lineup does not make the lineup unduly suggestive. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

Here, the prosecutor was required to prove that defendant was the person who fired the gun; therefore, identification of defendant as the shooter was material to the case, and the officer's testimony that he recognized defendant as the shooter from his photograph on "Detroit's Most Wanted" was probative of the accuracy of the officer's identification. The second officer's testimony that he used the police department's photograph of defendant in a photographic lineup was also probative with respect to establishing defendant's identity as the shooter. Although the testimony was somewhat prejudicial because it alluded that defendant had previously been arrested, the prejudice was minimized when neither officer testified about the reasons for the previous arrest.

Furthermore, the trial court took care to limit the prejudice when it instructed the jury before deliberations that the testimony could only be considered in the context of the officer's identification of defendant as the perpetrator of the instant offense and could not be used to find that defendant was a bad person likely to commit crimes, nor could the evidence of past offenses be used to convict defendant of the instant offenses. The reference to defendant's photograph on "Detroit's Most Wanted" did not constitute other-acts evidence for purposes of MRE 404(b), because no information was offered regarding defendant's prior conduct or criminal history. Pretrial notice under MRE 404(b)(2) was not required because the evidence presented at trial was not other-acts evidence.

Defendant's third argument is that the trial court gave an erroneous state-of-mind instruction to the jury. We disagree.

Because defendant did not challenge the jury instruction, our review is limited to a plain error analysis. *Carines, supra*, pp 763-764. We review jury instructions as a whole to determine whether there is error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). The instructions must include each element of the charged offense and must not omit material issues, defenses, and theories if supported by the evidence. *Id.*, p 648. "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *Id.* A trial court may instruct the jury that it may infer the defendant's state of mind from the facts and circumstances of the case. *People v Dumas*, 454 Mich 390, 398-400; 563 NW2d 31 (1997). And malice may be inferred from a defendant's use of a dangerous weapon. *Carines, supra*, p 760; *Dumas, supra*, p 403.

The trial court's instruction here neither informed the jury that it could presume defendant's intent to kill nor did it inform the jury that the law implied defendant's intent to kill if the jury found the existence of certain factors or circumstances. In fact, the trial court instructed the jury that it "must think about all the evidence in deciding what [defendant's] state of mind was at the time of the alleged killing." The trial court fairly presented the issues to be tried, and the jury instructions adequately protected defendant's rights. Thus, no error occurred.

Defendant's fourth argument is that he received ineffective assistance of counsel where defense counsel failed to challenge the admission of other-acts evidence and failed to challenge the trial court's state-of-mind instructions.² We disagree.

Because defendant did not move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). To establish ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance did not meet an objective standard of reasonableness, (2) that it is reasonably probable that if counsel had not erred, the result of the proceedings would have been different, and (3) that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel is presumed to have rendered effective assistance, and the defendant has the difficult task of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). As discussed, the admission of evidence and the state-of-mind instruction were proper. Because an attorney need not make a meritless motion or a futile objection, defense counsel's failure to object on these grounds did not constitute ineffective assistance. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant's fifth argument is that his non-parolable life sentence for first-degree murder was a determinate sentence in violation of the Michigan Constitution and that it was cruel and unusual punishment. We disagree.

Even though not raised before the trial court, we review this issue because it entails a significant constitutional question. *People v Harrington*, 194 Mich App 424, 427; 487 NW2d 479 (1992). An unpreserved constitutional issue is reviewed for plain error affecting a defendant's substantial rights. *Carines, supra*, pp 763-764. Const 1963, art 4, § 45 empowers the Legislature to provide for indeterminate sentencing. *People v Snider*, 239 Mich App 393, 426; 608 NW2d 502 (2000). While the constitution plainly authorizes indeterminate sentencing, it does not prohibit legislation mandating a determinate sentence as punishment for a crime. *Id.*, pp 426-427. Instead, the indeterminate sentencing statute exempts crimes for which the only punishment prescribed is life imprisonment or where the parameters of the sentence are statutorily defined. MCL 769.9(1). The Legislature has accordingly authorized mandatory life imprisonment without the possibility of parole as the only punishment for first-degree murder. MCL 750.316(1). Defendant received the statutorily prescribed sentence for his first-degree murder charge. Therefore, defendant's sentence does not violate the Michigan Constitution.³

² We note that the ineffective assistance claim with respect to defendant's state of mind was not properly presented. In the statement of the issue presented, defendant refers to the *victim's* state of mind; however, defendant's arguments relate to the instruction given by the court regarding *defendant's* state of mind.

³ Defendant further contends that his sentence violates the Michigan Constitution's prohibition against cruel and unusual punishment. However, the Michigan Supreme Court has held that a mandatory life sentence without the possibility of parole is not cruel or unusual punishment. *People v Launsbury*, 217 Mich App 358, 363; 551 NW2d 460 (1996), citing *People v Hall*, 396 Mich 650; 242 NW2d 377 (1976). Therefore, defendant's contention is without merit and his
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Lastly, we agree with defendant that his conviction and sentencing for both felony murder and felony premeditated murder offenses violated his right against double jeopardy. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). To remedy this double jeopardy violation, when a murder conviction rests on multiple theories, the judgment of sentence should be amended to reflect a single conviction and sentence for first-degree murder, supported by the two separate theories. *Id.* Accordingly, we remand this matter to the trial court for amendment of defendant's judgment of sentence.

Affirmed but remanded for amendment of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White

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conviction and sentence for first-degree murder is not cruel and unusual punishment.