

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY MILLER,

Defendant-Appellant.

UNPUBLISHED

October 18, 2005

No. 256496

Wayne Circuit Court

LC No. 04-001911-01

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. We affirm.

Defendant was convicted for the shooting of Andrew Bell and Randall Reed; Bell was killed and Reed was injured. Reed subsequently testified and identified defendant as the shooter. The crimes took place as Reed and Bell pulled up to a stop sign in Reed's Jeep. A green Taurus pulled up to the driver's side of the Jeep and the driver of the Taurus motioned for Reed to roll down his window. The driver then said "something like, some people shot up his people's house or something," and then fired between seven and nine shots toward Reed's Jeep as Reed attempted to pull away.

Defendant was apprehended later that day after a green Taurus was seen parked outside his home. Defendant was walking nearby and a neighbor directed police to him; footprints in the snow led from defendant's home to the neighbor's house. The footprints led through several backyards and impressions in the snow suggested that whoever made the prints had attempted to lie down under a parked minivan. Gunshot residue was detected on defendant's left hand.

On appeal, defendant first argues that both the Sixth and Fourteenth Amendments were violated by the paucity of African-Americans present in the jury array at trial. He notes that, of the forty available jurors, only one was African-American and there were no African-American males. He claims that this ratio suggests systematic exclusion from jury arrays of either African-Americans or residents of the city of Detroit. After de novo review, we disagree. See *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

“A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community.” *Id.* The Sixth Amendment guarantees the opportunity for a representative jury by requiring that the arrays from which juries are drawn do not systematically exclude distinctive groups in the community. *Id.* at 472-473. To establish a prima facie violation of the fair cross section requirement, defendant must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Id.* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). However, the Sixth Amendment does not require that a particular jury array exactly mirror the community, rather, a prima facie case of violation requires evidence concerning representation on a community’s jury arrays in general. *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997); *Hubbard, supra* at 472-473.

Here, defendant has failed to present a prima facie violation because he neither offered proof of underrepresentation on Wayne County jury arrays in general, nor presented evidence of systematic “exclusion resulting from some circumstance inherent in the particular jury selection process used.” See *id.* Moreover, defendant failed to timely move for remand on this issue pursuant to MCR 7.211(C)(1)(a) and has failed to offer an affidavit or other proof regarding what facts would be established on remand to show systematic exclusion. See MCR 7.211(C)(1)(a)(ii). Thus, defendant’s claim under the Sixth Amendment lacks merit.

Defendant’s Fourteenth Amendment equal protection claim fails for similar reasons. To present a prima facie case of discrimination in the context of jury selection, defendant must: “(1) show that the group excluded is a recognizable, distinct class capable of being singled out for different treatment under the laws, (2) prove the degree of underrepresentation by comparing the proportion of the excluded group in the total population to the proportion actually called to serve on the venire over a significant period, and (3) show that the selection procedure is either susceptible of abuse or not racially neutral.” *People v S L Williams*, 241 Mich App 519, 527-528; 616 NW2d 710 (2000).

Here, defendant has failed to offer evidence of underrepresentation over a significant period or of a procedure which is susceptible of abuse or not racially neutral. He merely presents evidence of the make-up of his own jury array and gives no indication of what further proof he would present if remand were granted. Therefore, defendant has failed to establish a prima facie case of discrimination under the Fourteenth Amendment.

Next, defendant argues that reversal is warranted because the trial court erroneously admitted as evidence items seized from his home pursuant to a search warrant on the day of the shooting. We disagree. Because defendant failed to object to the admission at trial, our review is for plain error that affected his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Items seized from defendant’s house and admitted as evidence included twelve .45 caliber bullets and eighty-seven .22 caliber bullets that were discovered scattered on a hallway floor in defendant’s home, two unfired bullets for an assault rifle that were found on a couch, and two plastic half-gallon bags of marijuana. The court later instructed the jury to disregard the marijuana. Defendant claims that the ammunition was not relevant to any fact in issue and

should have been excluded. However, even if we were to conclude that the trial court abused its discretion in admitting this evidence, reversal would not be warranted. Defendant has failed to persuade us that, in light of the properly admitted evidence, the outcome of the proceedings would have been different had the evidence not been admitted or that the error resulted in the conviction of an innocent defendant. See *id.* Further, defendant's briefly mentioned alternative argument in his reply brief that the evidence should have been excluded because the search warrant was defective is neither properly preserved nor presented for appeal. See MCR 7.212(C)(5); MCR 7.212(G); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Defendant next argues that his trial counsel was ineffective for failing to call his girlfriend, Tamichia Latham, as an alibi witness. We disagree. Because a hearing was not conducted pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), our review is limited to the existing record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different thus the proceedings were unfair or unreliable. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

In this case, defendant has not rebutted the presumption that his counsel's failure to call Latham constituted sound trial strategy that did not deprive him of a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). There are many plausible reasons for counsel's decision not to present defendant's girlfriend as his only witness and alibi evidence, including lack of credibility and the risk that the jury would focus on the strengths of the two versions of the events instead of the weaknesses in the prosecutor's case. In other words, the presentation of this extremely weak alibi evidence may have done more harm than good in this case and, thus, it was a matter of sound trial strategy not to pursue its admission. While in hindsight the strategy proved unsuccessful, this does not establish that counsel was ineffective. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

In his Standard 4 brief, defendant argues that he was also denied the effective assistance of counsel because his attorney failed to move to suppress Reed's in-court identification testimony that was tainted by an unduly suggestive photographic identification procedure before the preliminary examination and Reed had no independent basis for his identification. We disagree.

Reed testified at trial that before the preliminary examination a police officer showed him a Polaroid picture of defendant. Defendant argues that, because Reed did not participate in a corporal or photographic lineup, the showing of this one picture as a means of identifying defendant as the perpetrator was unduly suggestive and Reed's in-court identification would have been suppressed had defense counsel so moved. An identification procedure that is so suggestive in light of the totality of the circumstances that it leads to a substantial likelihood of misidentification denies a defendant due process. See *People v Kevin Williams*, 244 Mich App

533, 542; 624 NW2d 575 (2001). Showing a witness a single photo is considered a suggestive identification procedure. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). However, a suggestive identification procedure is not necessarily constitutionally defective. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). It is only improper if under the totality of the circumstances there is a substantial likelihood of misidentification. *Kevin Williams, supra*.

In this case, considering relevant factors associated with determining the likelihood of misidentification, we conclude that the likelihood of misidentification was not substantial. Reed testified that (1) he had seen defendant in his community once or twice before within a couple weeks or a month of the shooting, (2) just before the shooting Reed noticed a green Taurus in his rearview mirror and it was being driven fast and erratically, the weather was clear and it was light outside, the Taurus pulled up next to Reed's Jeep on the driver's side where Reed was sitting and was within two feet of his Jeep while Reed was stopped at a stop sign, the driver told Reed to roll down his window and then spoke to Reed before he began shooting, (3) Reed immediately drove to the police station and told the police that he recognized the shooter but did not know his name and described him, (4) Reed testified at the preliminary examination about two weeks after the shooting and identified defendant as the shooter, and (5) Reed testified at trial that he had an unobstructed view of the shooter and was sure that defendant was the shooter. See *Gray, supra* at 116. Although it is unclear why neither a corporal or photographic lineup were conducted, we cannot conclude that there is a substantial likelihood that Reed misidentified defendant as the perpetrator. See *Williams, supra*. Therefore, defense counsel's failure to move to suppress Reed's in-court identification testimony did not constitute ineffective assistance. See *Toma, supra*.

In his Standard 4 brief, defendant also argues that the evidence presented at trial was legally insufficient to support his convictions. After de novo review, considering the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the crime proven beyond a reasonable doubt, we disagree. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The evidence presented at trial included that a green Taurus like the one used in the shooting was found parked in front of defendant's home on the day of the shooting. Defendant was then found walking nearby and the jury could infer that he had made the footprints leading away from his house; the footprints also suggested that the person who made them had attempted to hide under a parked minivan. Defendant's left hand tested positive for gunshot residue and, although Reed initially thought that the shooter had used his right hand, the residue created the inference that defendant had, at a minimum, recently handled a fired gun with his left hand. Testimony also established that defendant easily could have wiped residue off of his right hand before the test. Finally, the fact that defendant was not wearing the clothing described by Reed could be easily explained by the inference that he had changed clothes at home before leaving and creating the path of footprints in the snow.

Most significantly, the jury heard Reed's direct testimony that defendant was the shooter. In the context of an appeal challenging the sufficiency of the evidence, questions of witnesses' credibility are left to the trier of fact, not the reviewing court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). This testimony that defendant was the shooter provides strong evidence that he was

culpable for Bell's death and the shooting of Reed, as well as for the possession of a firearm necessary to his felony-firearm and felon in possession of a firearm convictions.

There was also sufficient evidence of the intent elements of the charges for assault with intent to kill Reed and premeditated first-degree murder of Bell. To establish premeditation and deliberation, enough time must have passed between the initial homicidal intent and the killing to afford a reasonable person time to take a "second look." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). "Premeditation and deliberation may be inferred from the circumstances surrounding the killing." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Here, there was evidence that the shooter had formed an intent to kill whomever had "shot up his people's house." The shooter then decisively carried out his plan during the interval of time that it took him to locate and follow the Jeep, pull over next to it, ask Reed to roll down the window, and make accusations which arguably explained the intentional, retaliatory nature of the shooting. In sum, a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. See *Johnson, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra