

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WADE N. SCOTT,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262671

Wayne Circuit Court

LC No. 04-012767-01

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for the first-degree murder conviction; 5 to 20 years' imprisonment for the possession of a firearm by a felon conviction; and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises out of a shooting that occurred at the Tippin Inn Lounge on May 1, 2004. Just after the lounge closed at 2:00 a.m., Jakira McGee was outside the front door speaking with her friend, Anthony Kelly. Antwjuan White and Mark Cowans, who worked security for the club, were standing outside after closing. Kelly was sitting in the passenger's seat of a car, and McGee was standing near the car. As the car Kelly was in started to pull away, Kelly flicked a cigarette out the window and it landed in front of McGee and a man, whom she did not know, who was standing near her. McGee and White heard the man yell, and McGee, White and Cowans all observed him pull out a silver or chrome gun and fire at Kelly five or six times. Kelly died from the gunshot wounds. All three witnesses identified defendant as the shooter.

Defendant's first issue on appeal is whether the trial court erred in allowing three eyewitnesses to identify defendant during the trial after they had been exposed to defendant at numerous preliminary examinations. We note that any issues arising related to the identification of a criminal defendant are of particular concern, because the critical question answered in a criminal prosecution is whether this defendant is guilty of this crime. However, defendant did not object to any of the identification testimony below on this basis, and failure to raise issues concerning identification procedures before the trial court leaves this issue unpreserved for review by this Court. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*,

460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred; 2) the error was plain; i.e., clear or obvious, 3) and the plain error affected substantial rights. *Carines, supra* at 763. The third requirement generally requires a showing of prejudice; i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Carines, supra* at 763. Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *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.” *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Factors include the length of time between the crime and the preliminary examination confrontation, the opportunity of the witness to view the culprit at the time of the crime and the witness’s degree of attention, the level of certainty demonstrated by the witness at the confrontation, and the accuracy of the witness's prior description of the criminal. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

In this case, the preliminary examination was adjourned six times, and each eyewitness admittedly saw defendant in the court three or four times. However, all three witnesses also had ample opportunity to observe defendant outside the club before the shooting.¹ Defendant argues that the witnesses were affected by the “darkness of the night, and the effects of alcohol.”² Defendant also argues there were discrepancies as to height, complexion, and the presence of facial hair in the descriptions given by the witnesses.³ However, all three were certain that defendant was the shooter, despite the discrepancies in the descriptions they initially provided. McGee was the only eyewitness to testify at the preliminary examination, and seven months had passed between the May 1, 2004 shooting and the December 16, 2004 preliminary examination. Given the totality of the circumstances here, noting that the descriptions given were not as diverse as defendant suggests on appeal, and particularly noting the certainty of all three

¹ McGee testified that she stood next to defendant for at least 10 minutes before the shooting, and spoke to him once, asking him about a scratch on his neck which was bleeding.

² McGee testified that she had two drinks between 11:30 pm and 2:00 am. White and Cowans both testified that they did not have anything to drink that night.

³ McGee estimated the shooter was around 5’9” in height. White told the police that the shooter was 5’10” tall. Cowans told the police that the shooter was 5’9” in height. White and Cowans both described the shooter’s complexion as “medium,” and McGee said only that he was a “Black male.” Cowans told the officers that the shooter had facial hair and needed a hair cut; White noted a goatee and a “one-length haircut”; McGee observed short hair and a clean shaven face.

eyewitnesses that defendant was the shooter, we conclude that the opportunities the witnesses had to see defendant before trial did not create a substantial likelihood of misidentification, and it was therefore not clear error to admit the identification testimony.

Defendant further argues that the trial court erred in admitting McGee's in-court identification because the court failed to determine if there was an independent basis for the identification. McGee had picked defendant out of a photographic line-up, but no defense counsel was present during this line-up. Before trial, defense counsel brought a motion to suppress McGee's identification of defendant from the photo line-up. The trial court deferred its decision, but on the first day of defendant's trial, ruled that the prosecution could not present testimony that McGee had picked defendant out of a photographic lineup. The trial court noted at that time that it needed to decide, if and when McGee testified, whether McGee had an independent basis for any in-court identification, but that hearing was never held. When McGee was called as a witness, defense counsel did not object or request the hearing. At the prosecutor's request, during cross-examination when it appeared defense counsel was going to ask McGee whether she had participated in a line-up, the jury was taken out of the courtroom and the prosecutor instructed the witness that she could not give any testimony as to the photo line-up.

"The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003) (citation omitted). If the decision involves a question of law, we review that decision de novo. *Id.*

In determining whether an independent basis for identification exists, a court reviews these factors:

(1) prior relationship with or knowledge of the defendant, (2) the opportunity to observe the offense, which includes such factors as length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act, (3) length of time between the offense and the disputed identification, (4) accuracy or discrepancies in the pre-confrontation description and defendant's actual description, (5) any previous proper identification or failure to identify the defendant, (6) any prior identification of another person as defendant, (7) the nature of the alleged offense and the physical and psychological state of the witness, and (8) any idiosyncratic or special features of defendant.

People v Gray, 457 Mich 107, 115-116; 577 NW2d 92 (1998) (citation omitted).

In this case, McGee testified that she stood next to defendant for at least ten minutes before the shooting. She stated she observed that he appeared to be bleeding from a cut on his neck, and asked him about it, although he did not respond. She was standing in close proximity to the shooter and the victim at the time of the shooting. Even if the other factors are not met, here "the opportunity to observe the offense" was clearly present. We cannot find that McGee's identification was inadmissible as a matter of law or that the trial court abused its discretion in admitting the evidence even without holding the hearing. We note also that given the testimony of two other eyewitnesses, McGee's testimony was somewhat cumulative.

Defendant's second issue on appeal is whether he was denied the effective assistance of counsel by defense counsel's failure to file a motion to suppress the identification testimony. Defendant did not move for a new trial or an evidentiary hearing on this basis below. Failure to so move forecloses appellate review unless the record contains sufficient detail to support his claims, and, if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To prevail on a claim of ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 599-600. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). 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).

Defense counsel was not deficient under an objective standard of reasonableness because the identifications were properly admitted. As discussed above, the eyewitness testimony was properly admitted because the pretrial confrontations were not unduly suggestive. Accordingly, any motion to suppress the identifications would have been futile and defense counsel is not ineffective for failing to bring a futile motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

Defendant's third issue on appeal is whether he was denied a fair trial by the admission of testimony that he possessed a gun similar to the one used in the shooting ten days after the shooting. A challenge to a trial court's evidentiary ruling is reviewed for an abuse of discretion. *Katt, supra*. An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

Character, or other acts, evidence may be admitted where: (1) the evidence is offered for some purpose other than under a character-to-conduct theory, or a propensity theory; (2) the evidence is relevant to a fact of consequence at the trial; and (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. If requested, the trial court may provide a limiting instruction under MRE 105. *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003). A proper purpose for admission is one that seeks to accomplish something other than the establishment of a defendant's character and his propensity to commit the offense. *People v Johnigan*, 265 Mich

App 463, 465; 696 NW2d 724 (2005). In this case, the prosecution used the evidence for the proper purpose of establishing identity.

The other acts evidence was relevant. Relevant evidence is evidence that is materially related to any fact that is of consequence to the action and has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. “Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense.” *People v Houston*, 261 Mich App 463, 467; 683 NW2d 192 (2004), aff’d in part and rev’d in part on other grounds *People v Houston*, 473 Mich 399 (2005), quoting *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989).

The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court is in the best position to gauge the effect of such testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). In this case, it is unlikely that the jury would give undue weight to the prior possession of a gun when there were three eyewitnesses identifying defendant as the shooter.

Defendant’s fourth issue on appeal is whether the trial court erred by denying defendant’s motion for a directed verdict. A trial court’s decision on a motion for directed verdict is reviewed de novo to determine whether, when viewed in the light most favorable to the prosecution, the evidence presented by the prosecutor could persuade a rational jury that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

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); MCL 750.316. Defendant only challenges whether there was sufficient evidence to show premeditation. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation may be established by evidence of: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *People v Abraham*, 234 Mich App 640, 656-657; 599 NW2d 736 (1999), quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

In this case, defendant and Anthony Kelly did not have a prior relationship. Defendant did yell at Kelly after Kelly flicked his cigarette at him. Defendant also waited to shoot until Kelly smiled and raised his hands. After the shooting, defendant fled. While everything happened quickly in this case, a rational trier of fact could have found that defendant had time to take a second look and only decided to kill Kelly after thinking about it. Questions of intent

should be left to the trier of fact to resolve and we conclude the trial court did not err by denying defendant's motion for a directed verdict.

Affirmed.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski