

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRESE COLEMAN BUGGS,

Defendant-Appellant.

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UNPUBLISHED

January 12, 2006

No. 258347

Genesee Circuit Court

LC No. 04-013625-FC

Before: Murray, PJ. and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, and possessing a firearm during the commission of a felony, MCL 750.227b(a). The trial court sentenced defendant to 31 years and three months to 60 years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

First, defendant argues that he was denied his right to effective assistance of counsel because defense counsel did not request a hearing to establish an independent basis for the in-court witness identification. We disagree. Absent a motion for new trial or an evidentiary hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Rocky*, 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 the trial court finds the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible unless an independent basis for in-court

identification can be established “that is untainted by the suggestive pretrial procedure.” *Id.* (citation omitted).

In regard to the photographic line-up, trial testimony demonstrated that, after witnessing the incident, Cobb described the perpetrator to police. The description included skin color, haircut, facial hair, height, weight, and clothing. Cobb testified that, although there was some distance between him and the perpetrator, there was nothing obstructing his view. Although approximately two years passed before Cobb was called to identify defendant, the officer and Cobb testified that Cobb was told that the perpetrator may or may not be in the line-up. Cobb testified that he picked defendant based on his memory of the perpetrator. Cobb also testified that defendant had the same shaped face and complexion as he remembered the perpetrator having, but his hairstyle was different. Further, the photographs shown in the line-up were a computer-generated sample of people with traits similar to defendant’s.

In regard to the live line-up, Cobb testified that the police did not give him any hints and everyone in the line-up was dressed the same. Cobb testified that he eliminated people on the basis of physical characteristics. The other suspects in the line-up were chosen for their resemblance to defendant. Defendant narrowed his choice down to two people, one of which was defendant. Defense counsel was also present for this line-up and the suspects were approved by the public defender.

On the basis of this record, we conclude that the pretrial identification procedure was not so suggestive that it led to a substantial likelihood of misidentification. Therefore, defense counsel was not ineffective for failing to request a hearing to establish an independent basis for the in-court identification. Defense counsel is not required to advocate a meritless position. *Snider, supra* at 425.

Next, defendant argues that his Sixth Amendment right to confront witnesses against him was violated when the trial court refused to allow him to impeach a witness by cross-examining him regarding his withdrawal of a notice of an alibi witness in a previous case. We disagree. We review a preserved constitutional issue de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

In *People v Bushard*, 444 Mich 384, 391; 487 NW2d 758 (1993), our Supreme Court noted “the Confrontation clause guarantees the *opportunity* for effective cross-examination, not cross examination that is effective in whatever way, and to whatever extent the defense might wish.” (Citation omitted). MRE 608(b) allows specific instances of conduct of a witness to be inquired into during cross-examination “at the discretion of the court, if probative of truthfulness or untruthfulness.” Defendant asserts that the evidence would have been relevant to the witness’s credibility because his alibi notice was fraudulent. Defendant asserts that the alibi notice was fraudulent because, after filing it, the witness entered a guilty plea. The trial court denied defendant’s request for cross-examination because the notice was not probative of truthfulness. We agree with the trial court. The fact that a defendant ultimately pleads guilty does not indicate that his prior alibi notice was fraudulent. A defendant may file a notice, according to the requirements of MCL 768.20(1), to preserve his right to call the witness and later withdraw it for reasons unrelated to his trustworthiness. The limitation defendant complains of did not deny him a fair trial or violate his right of confrontation.

Finally, defendant argues that the trial court abused its discretion in allowing the preliminary examination testimony of a witness to be read to the jury. We disagree. This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MRE 804(b)(1) provides an exception to the hearsay rule for previous testimony when the witness is unavailable. MRE 804(a)(5) defines “unavailability” as “absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means, and in criminal case, due diligence is shown.”

The test for whether a witness is “unavailable” as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. [*People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998) (citations omitted).]

In this case, a police officer and a witness coordinator from the prosecutor’s office testified that they spoke with the witness the day after the trial commenced and verified that she had received her subpoena and that she was going to be at the trial. They testified that the witness expressed transportation and timing issues, but otherwise agreed to attend the trial. Later that day, the witness had someone else call to say she did not plan on attending. A warrant was issued immediately and the Detroit Police Department was contacted to secure the witness who was known to reside in Detroit. The local authorities testified that they were in continued contact with the Detroit Police Department verifying the actions taken and whether those actions were successful. Under these circumstances, the trial court did not abuse its discretion in admitting the witness’s preliminary examination testimony.

Affirmed.

/s/ Christopher M. Murray  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly