

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARLO GILBERT,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 182229

Wayne Circuit Court

LC No. 94-004621

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty to thirty-five years' imprisonment for the second-degree murder conviction, and two years' imprisonment for the felony-firearm conviction, the former sentence to be served consecutively to the latter. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree murder. We disagree. When reviewing a denial of a motion for a directed verdict, this Court must consider the evidence presented by the prosecution up to the time that the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

First-degree murder is the intentional killing of another, done with premeditation and deliberation. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Premeditation and deliberation may be inferred from the circumstances, including the defendant's behavior before and after the crime. *Id.* Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation may be established through evidence of the following factors: 1) the prior relationship of the parties; 2)

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the defendant's actions before the killing; 3) the circumstances of the killing itself; and 4) the defendant's conduct after the homicide. *Id.*

Viewing the evidence in a light most favorable to the prosecution, we find that the prosecution presented sufficient evidence to allow the jury to consider whether defendant premeditated and deliberated the killing. Defendant ran to his car, got a gun, walked up to the victim, and shot him at what was described at trial as "point-blank" range. After the victim fell to the ground, defendant shot him twice more. Defendant then turned to the watching crowd and asked, "Who's next?" The medical examiner found that at least one of the victim's gunshot wounds was inflicted from only six inches away. In light of the above evidence, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant's second issue is that the court committed error warranting reversal in admitting hearsay testimony from two of the prosecution's witnesses. Again, we disagree. The decision to admit evidence is within the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *People v Harris*, 219 Mich App 184, 185-186; ___ NW2d ___ (1996).

Here, the trial court did not abuse its discretion in admitting the testimony at issue. The statements made by witnesses Creig Young and Detroit Police Officer Steven Howell were not hearsay because they were not offered to prove the truth of the matter asserted. See *People v Poole*, 444 Mich 151, 158 n 9; 506 NW2d 505 (1993). Young's statements were offered to establish why he gave the name "Man" to the police. Officer Howell's statement was offered as a prior inconsistent statement to impeach Young's testimony that he did not know defendant and had never seen him before. Extrinsic evidence of a witness' prior statement may be offered to impeach, as long as the witness is offered a chance to explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon. MRE 613(b); *People v Malone*, 180 Mich App 347, 358-359; 447 NW2d 157 (1989). Therefore, the above testimony was not hearsay, and it was properly admitted at trial.

Third, defendant claims that he received ineffective assistance of counsel at trial because his trial counsel questioned the victim's wife about her religious beliefs, and failed to request a lineup to substantiate the identification of defendant by Young prior to the preliminary examination. Since defendant did not preserve this issue for review by moving in the trial court for an evidentiary hearing or for a new trial, our review is limited to the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

MCL 600.1436; MSA 27A.1436 expressly states that questions as to the religious opinions of a witness are not permissible. *People v Jones*, 82 Mich App 510, 516; 267 NW2d 433 (1978). The purpose of the statute is to strictly avoid any possibility that jurors will be prejudiced against a certain witness because of personal disagreement with the religious views of that witness. *Id.* This object recognizes the deep personal feelings many people hold on religion, feelings that may unavoidably

conflict with a juror's sworn duty to decide solely on the evidence presented, without injection of personal prejudices. *Id.*

Trial counsel's questioning of the victim's wife about her religious beliefs did violate MCL 600.1435, MSA 27A.1436. Nevertheless, defendant's claim of ineffective assistance of counsel on this basis is without merit because defendant was not prejudiced by counsel's questioning of the witness in this regard. Any prejudice would have worked to the detriment of the prosecution.

Likewise, we find no merit to the claim based upon the failure to request a lineup. To establish ineffective assistance of counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because defendant makes no claim based on the record that the identification was impermissibly suggestive, see *People v Kurylczyk*, 443 Mich 289; 505 NW2d 528 (1993), and because two other witnesses identified defendant at trial as the person who shot the victim, we conclude that defendant has failed to sustain his burden of showing that trial counsel's representation prejudiced him.

Defendant's next issues on appeal are related. They are that the trial court committed error requiring reversal by instructing the jury that it could infer his intent to kill from his use of a dangerous weapon because this instruction shifted the burden of proving the elements of first-degree murder to defendant, and that the trial court committed reversible error by instructing the jury that it could use Young's testimony from the preliminary examination as substantive evidence at trial. Defendant did not properly preserve either issue for appeal, so our review is limited to consideration of whether relief is necessary to avoid manifest injustice. *People v Curry*, 175 Mich App 33, 39; 437 NW2d 310 (1989). Based on our review of defendant's claims of instructional error by the trial court we find that no manifest injustice will result from our failure to further review these claims because the instructions given by the trial court were proper.

Finally, defendant argues that he should be granted a new trial on the basis of newly discovered evidence. We disagree. Defendant did not preserve this issue for review by moving for a new trial below, and his motion for remand in this Court was denied because it was defective. Moreover, we note that the new evidence offered by defendant is cumulative of defendant's trial evidence, would not have caused a different result at trial, and, had defendant exerted due diligence, could have been presented at trial. *People v Sharbnaw*, 174 Mich App 94, 104; 435 NW2d 772 (1989).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Marilyn Kelly
/s/ Joseph B. Sullivan