STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 1999
v	No. 193137 Jackson Circuit Court
GREGORY A. DERBYSHIRE, Defendant-Appellant.	LC No. 95-073558 FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.242(2). The convictions arise from the armed robbery and murder of Donald Reynolds, the owner of the Silver Rail Bar in Jackson County, during the early morning hours of September 3-4, 1980. Defendant was sentenced to mandatory life imprisonment without parole for the first-degree murder conviction, life imprisonment for the armed robbery conviction, and to a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first claims that he was denied the effective assistance of counsel because of numerous purported deficiencies of counsel that denied him a fair trial. Evidentiary hearings were held on defendant's claims of ineffective assistance of counsel and the trial court twice determined that defendant was not deprived of his right to the effective assistance of counsel. We agree with the trial court's conclusions.

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington,* 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens,* 446

Mich 298, 302-303; 521 NW2d 797 (1994). There is a strong presumption that counsel provided effective assistance and defendant's burden to overcome that presumption is high. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We agree with the trial court that defense counsel's decision not to present an "imperfect alibi" defense was a matter of trial strategy. See *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995); *Pickens, supra* at 329-330. Where defendant did not present conclusive evidence at the hearings below that he, in fact, had an alibi, other than speculation as to the mere possibility of an alibi, defendant has not established that his counsel's performance was deficient for failing to pursue this defense, and defendant has not shown that the alleged "deficient performance" prejudiced the defense such that there was a reasonable likelihood that the result at trial would have been different if the potential alibi defense would have been presented. *Strickland, supra* at 687; *Pickens, supra* at 327. As in *LaVearn*, there is nothing to suggest that defense counsel's eschewing of this weak defense significantly affected the outcome of the trial. *LaVearn, supra* at 216.

Defendant also failed to show that further investigation by counsel or the police regarding other leads, suspects, or witnesses would have revealed any information beneficial to defendant. Therefore, defendant has failed to establish that the absence of this information prejudiced him and that his counsel was ineffective in this regard. See *People v Mitchell*, 454 Mich 145, 162-167; 560 NW2d 600 (1997); *People v Caballero*, 184 Mich App 636, 640-641; 459 NW2d 80 (1990). As to those witnesses who defense counsel may have interviewed, but failed to present as witnesses, defendant has not overcome the presumption that counsel's decision not to present these witnesses was a matter of trial strategy. *Mitchell, supra* at 163.

We agree with the trial court's determination that defense counsel's decision not to go through a "laundry list of inconsistencies" in closing argument regarding various witnesses' testimony was a matter of trial strategy, which we will not second-guess in hindsight. *Strickland, supra* at 689; *LaVearn, supra* at 216.

Defendant's claim that counsel was ineffective for failing to move during trial for a directed verdict on the charge of first-degree premeditated murder is without merit because there was sufficient evidence presented to convict defendant of that charge. Defense counsel was not obligated to bring a meritless motion. *People v Darden*, 230 Mich App 597, 605; __ NW2d __ (1998).

Defendant also argues, as he did below, that counsel was ineffective for failing to present evidence that Raab was an inmate under sentence with the Department of Corrections in the resident home program at the time he claimed to have been with defendant and codefendant Daniel Wolfe when the instant offense was committed. The evidence at the hearings regarding this matter revealed that, despite Raab's status as an "inmate," it was possible that he could have been present at the time the instant offenses were committed. Although the evidence may have been used to further impeach Raab's credibility, which was significantly impeached on cross-examination by defense counsel, this is generally insufficient to warrant a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Defendant has not established the requisite prejudice, i.e., that there is a reasonable probability that the

result at trial would have been different had the information been disclosed to the jury. *Strickland, supra* at 694; *Pickens, supra* at 302-303.

We decline to address defendant's remaining claims regarding ineffective assistance of counsel because his counsel was not questioned in regard to those claims at the hearings held below. See *Mitchell, supra* at 169-170.

II

As previously noted, we disagree with defendant's claim that there was insufficient evidence of premeditation and deliberation to support his conviction of first-degree murder. Viewing the evidence in a light most favorable to the prosecution, *People v Hampton,* 407 Mich 354, 368; 285 NW2d 284 (1979), we conclude that there was ample evidence that defendant had sufficient time to take a "second look" when he fired two bullets into the back of the victim's head. *People v Tilley,* 405 Mich 38, 45; 273 NW2d 471 (1979). Further, because the totality of the evidence presented does not preponderate heavily against the jury's verdict, defendant was not entitled to a new trial on the basis that the verdict was against the great weight of the evidence. *Lemmon, supra* at 642.

III

Defendant next contends that the trial court abused its discretion in denying his motion for mistrial based on an asserted violation by the prosecutor of the in limine order prohibiting the mention of a handgun.[1] We disagree. The order in limine, and the motion in limine on which it was based, were specifically limited to a Derringer, not a handgun with a clip as was the subject of the testimony in question. Defense counsel was aware, prior to trial, that Raab would testify regarding defendant's possession of a handgun, not a Derringer, following the robbery-murder. If counsel wanted evidence of *any* handgun excluded, counsel could have included this in the motion in limine, but did not do so. The order in limine was not violated, and the evidence was admissible as relevant and more probative than prejudicial. MRE 402 and 403.

IV

Defendant next claims that the trial court erred in denying his motion for mistrial due to prosecutorial misconduct based on the prosecutor's elicitation from Gary Raab that he would have claimed the Fifth Amendment privilege against testifying if he had not been granted immunity.

A lawyer may not call a witness knowing that the witness will claim a valid privilege not to testify. *People v Dyer,* 425 Mich 572; 390 NW2d 645 (1986). However, in the instant case, Raab did not invoke the Fifth Amendment privilege. Rather, he stated that he *would* have invoked the privilege but for a grant of immunity. Pursuant to the grant of immunity, Raab testified at trial.

Where an accomplice or co-conspirator has been granted immunity to secure his testimony, that fact may be revealed to the jury during examination of the witness by the prosecutor. See *People v Manning,* 434 Mich 1, 13; 450 NW2d 534 (1990); *People v Atkins,* 397 Mich 163, 173; 243 NW2d 292 (1976). Defendant was not denied a fair trial by the disclosure that Raab obtained

immunity in exchange for his testimony. *Id.* Any error regarding the witness' possible invocation of the Fifth Amendment privilege was, at most, harmless error.

Defendant was not denied a fair trial due to prosecutorial misconduct, *People v Bahoda,* 448 Mich 261; 531 NW2d 659 (1995), and the trial court did not err in denying the motion for mistrial on this basis.

V

Finally, defendant claims that he was entitled to a new trial because a taped statement by key prosecution witness Gary Raab was not provided to defense counsel prior to trial. Defendant's claim is without merit.

In reviewing this claim, we consider whether (1) the suppression was deliberate, (2) the evidence was requested, and (3) the defense could have significantly used the evidence. *People v Miller (After Remand),* 211 Mich App 30, 47; 535 NW2d 518 (1995). At the hearing below on remand regarding this matter, there was no evidence presented that the police or prosecutor deliberately failed or refused to disclose the statement in question. The existence of the taped statement was disclosed in a police report provided to defense counsel prior to trial and was disclosed at the preliminary examination. Further, it is undisputed that the defense did not request the taped statement until after trial, and that when the request was made, the tape was provided to the defense. Finally, defendant has not demonstrated that the defense could have significantly used the evidence to render a "reasonable probability" that the result would have been different had the evidence been given to the defense prior to trial. See *Kyles v Whitley,* 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490, 505-508 (1995); *Stanaway, supra* at 666; *People v Barbara,* 400 Mich 352, 362-363; 255 NW2d 171 (1977). The evidence was not "newly discovered." *Barbara, supra.* Hence, the trial court correctly determined on remand that defendant was not entitled to a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell

[1] Defendant's trial counsel did not join in codefendant's counsel's motion for mistrial. However, defendant's attorney did ask the court for a curative instruction that the jury was not to regard any mention of a gun and asked that any reference to a handgun be excluded. Defendant also raised this issue in his motion for new trial.