

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS CARSTANIEL HART,

Defendant-Appellant.

UNPUBLISHED

March 16, 1999

No. 206359

Recorder's Court

LC No. 96-008761

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and armed robbery, MCL 750.529; MSA 28.797. He was sentenced to life without parole for the felony murder conviction and to ten to twenty-five years' imprisonment for the armed robbery conviction. His sentence for armed robbery was subsequently vacated, and he was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty-five to fifty years' imprisonment. He appeals as of right, and we affirm.

I

Defendant first contends that the trial court erred in denying his motion for directed verdict of acquittal on the charge of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). He argues that the evidence presented at trial was insufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that he was guilty of that charge. We disagree.

When ruling on a motion for a directed verdict, the trial court considers the evidence presented by the prosecutor, up to the time the motion was made, in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). To prove first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim and that the act of killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995); *People v Coddington*, 188 Mich App

584, 599; 470 NW2d 478 (1991). Defendant claims that there was insufficient evidence of deliberation and premeditation.

In *Coddington, supra*, this Court was presented with this same issue. The defendant argued that a directed verdict on the first-degree murder charge should have been granted in his favor because there was insufficient proof of deliberation and premeditation. This Court stated:

To constitute first-degree murder, it must be established that a defendant's intentional killing of another was deliberate and premeditated. While the length of time needed to measure and evaluate a choice before it is made is incapable of precise determination, there must be some interval in which a "second look" can be contemplated. Premeditation and deliberation may be inferred from the facts and circumstances established on the record. Though not exclusive, factors which may be considered to establish premeditation include: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. [*Id.* at 599-600.]

In this case the evidence, viewed in a light most favorable to the prosecutor, was sufficient to enable a rational jury to find the elements of premeditation and deliberation beyond a reasonable doubt. The facts and circumstances supporting the inference of premeditation and deliberation include: defendant knew the victim and had apparently borrowed money from him in the past; defendant went to the victim's house in order to get money for drugs; the victim refused to give defendant the money; when the victim refused to give defendant money, defendant had his girlfriend offer the victim sexual favors in exchange for money; when the victim refused, defendant began to argue and push the victim; defendant became angry; when the victim still refused to give defendant money, defendant stabbed the victim; the victim sustained wounds to the palms of his hand, which indicate that he attempted to deflect the knife away; defendant ultimately stabbed the victim four times; the knife was left in the victim; the wound inflicted by the knife as left in the victim was eight inches deep in the left upper side of the victim's chest, puncturing the victim's aorta; that wound was fatal; the other three stab wounds were insufficient to kill the victim; defendant searched the victim's pockets and a room in the victim's house for money and found between \$500 and \$600; before leaving the victim's house, defendant wiped his fingerprints off of everything that he had touched; and finally, defendant and defendant's girlfriend left the victim's house, went to a motel, bought drugs, and stayed at the motel for two or three days. We disagree with defendant's assertion that the evidence gives rise to the inference that defendant killed the victim on impulse. Defendant went to the victim's house to obtain money. He attempted to do so by asking for it. When that failed, his girlfriend offered sexual favors in exchange for the money. When that failed, defendant killed the victim and secured the money. He then attempted to rid the victim's home of any evidence tying him to the crime. Viewed in a light most favorable to the prosecution, the evidence was sufficient to justify the submission of the first-degree premeditated murder charge to the jury.

II

Defendant next contends that he was denied the effective assistance of counsel for numerous reasons. We disagree. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell, supra*. Where defendant fails to move for a new trial or evidentiary hearing, our review is limited to errors that are apparent from the trial court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

In this case, defendant failed to move for an evidentiary hearing or new trial on grounds of ineffective assistance of counsel. The record before us lacks sufficient detail to evaluate many of defendant's claims¹, including that: 1) counsel did not receive a coroner's report, which would have assisted in establishing defendant's alibi defense; 2) counsel failed to follow up in obtaining criminal histories of certain prosecution witnesses even though she had a court order allowing her to do so²; 3) counsel failed to interview witnesses prior to trial and was unaware of information that could have been used to challenge the identification of defendant as the perpetrator³; 4) counsel should have more fully questioned witnesses about contradictions between their preliminary examination testimony and their trial testimony⁴; 5) counsel failed to preserve a letter that a prosecution witness had written to defendant, which revealed police misconduct; and 6) counsel did not meet with defendant a sufficient number of times prior to trial in order to prepare his defense. Because the record is insufficient to review any of these allegations of ineffective assistance of counsel, appellate review of those issues is precluded. We also decline to accept defendant's request to remand for a *Ginther*⁵ hearing. Defendant never moved for such a remand pursuant to MCR 7.211.

We find, however, that the record is sufficient to review defendant's claims that defense counsel improperly failed to present his alibi defense; that defense counsel improperly failed to allow him to testify in his own behalf; and that defense counsel failed to adequately impeach witnesses and offer a substantial defense.

First, we find that defendant's claims regarding an alibi defense are without merit. The record does not support that, but for defendant's counsel, defendant would have been able to assert an effective alibi defense, resulting in acquittal. Defendant claims that counsel should have called alibi witnesses to testify in his behalf. Counsel's failure to call witnesses is presumed to be trial strategy. *Mitchell, supra* at 163.

In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. [*People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).]

Defendant cannot make the requisite showing. The record does not reveal that there were any actual alibi witnesses in this case, who would place defendant at another location at the time of the murders.

Defendant's bare assertions to the contrary are unsupported. In fact, defendant even acknowledges in his brief that one of the alleged alibi witnesses denied being with defendant at the time of the murder. Because there has been no showing that the witnesses named by defendant would have provided alibi testimony, there cannot be a showing that counsel's failure to call them deprived him of a substantial defense. Defendant also claims that his alibi defense was destroyed because his counsel failed to timely pursue it, and this failure resulted in the loss of a receipt from the motel where he was a registered guest. The motel receipt, although evidencing that he was a guest in the motel on the evening of the murders, would not have supported his alibi defense. The fact that he was a registered guest at a motel would not have precluded him from going to the victim's home and committing the murder. The alibi defense was weak, especially where there was eyewitness testimony that defendant committed the murder. Defendant has failed to show that there was a reasonable probability that he would have been acquitted had his counsel pursued such a defense.

Second, we find defendant's claim that his counsel should have allowed him to testify and present an alibi defense to be without merit. Defendant stated, on the record, that he chose to exercise his constitutional right not to testify on his own behalf. He cannot now claim that his counsel precluded him from testifying and presenting an alibi defense.

Third, we disagree with defendant that his counsel failed to properly and vigorously cross-examine witnesses and impeach their testimony, present necessary evidence, and present a substantial defense. Our review of the record reveals that counsel's representation did not fall below an objective standard of reasonableness. Counsel was aware of the facts of the case, presented a denial defense, and vigorously attacked the credibility of the witnesses. Decisions regarding which witnesses to call, what evidence to present, and which questions to ask witnesses are considered part of trial strategy. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997). Defendant has failed to overcome the presumption that he received the effective assistance of counsel.

III

Defendant next contends that he was denied a fair trial because the prosecution failed to provide requested discovery, specifically a copy of the coroner's report and the criminal histories of prosecution witnesses. This issue was not preserved for appellate review because it was not raised in the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Moreover, we decline to further review this issue because the record is insufficient to allow a determination of whether the prosecutor withheld discovery, and we find no manifest injustice.

IV

Finally, defendant contends that his fourth amendment right against unreasonable searches and seizures was violated because he was arrested, in a private home, without a warrant. Since defendant was arrested pursuant to a warrant, defendant's claim is without merit.

V

Defendant next contends that he was denied a fair trial by the cumulative effect of errors. Only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448

cumulative error. See *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Affirmed.

/s/ Janet T. Neff

/s/ Michael J. Kelly

/s/ Harold Hood

¹ We note that defendant expands the record on appeal in an attempt to demonstrate that counsel's pretrial investigation and meetings were insufficient, and that her performance was not effective. Defense counsel's file and several other exhibits attached to defendant's standard 11 brief were not part of the record below, and we will not consider them. It is impermissible to expand the record on appeal. *Trail Clinic, P.C. v Bloch*, 114 Mich app 700, 713; NW2d (1982).

² We note that there is no evidence that any prosecution witnesses even had prior criminal records.

³ Even if counsel had failed to interview witnesses, this failure does not, by itself establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Defendant must also demonstrate that the failure to interview witnesses resulted in counsel's ignorance of valuable evidence which would have substantially benefited defendant. *Id.* Here, defendant fails to make the requisite demonstration that any information these witnesses may have had would have substantially benefited him.

⁴ We note that the preliminary examination transcript is not part of the record on appeal. Thus, we cannot verify that there were inconsistencies, which were not brought out at trial.

⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).