

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JAMES COOLEY,

Defendant-Appellant.

UNPUBLISHED

May 19, 2000

No. 217829

Kent Circuit Court

LC No. 98-006050-FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Willie James Cooley of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). The trial court sentenced Cooley to a mandatory sentence of life without parole. Cooley appeals as of right. We affirm.

I. Basic Facts And Procedural History

This case arises from an altercation between Cooley and Catherine Graves on May 25, 1998, during which Cooley murdered Graves. Although Cooley initially denied having any involvement or knowledge of any crime, he ultimately confessed to stabbing and shooting Graves during an argument. At trial, Cooley claimed that he acted in self-defense when he stabbed Graves, that he accidentally shot her, and that he was too intoxicated to have been able to premeditate killing Graves.

II. Lack Of Premeditation

A. Preservation Of The Issue And Legal Standard

Cooley argues that, because he was intoxicated when he killed Graves, he lacked the requisite intent to commit first-degree murder, and that he should have been found guilty of second-degree murder. He therefore contends that there was insufficient evidence of premeditation and deliberation. No special motion or procedure is necessary to preserve a challenge to the sufficiency of the evidence for appellate review. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). Therefore, we address Cooley's claim.

When determining whether the prosecution has presented sufficient evidence to sustain a conviction, this Court “‘must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.’” *People v Jermell Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *Wolfe, supra* at 515-516.

B. Premeditation As An Element Of First-Degree Premeditated Murder

The crime of first-degree premeditated murder under MCL 750.316(1)(a); MSA 28.548(1)(a), requires the prosecution to prove beyond a reasonable doubt “that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). “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). The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing.” *Id.* The prosecutor may use the following four factors to prove premeditation: “(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.” *Anderson, supra* at 537.

C. Intoxication As A Defense

The Michigan Supreme Court has noted that intoxication can be a defense to first-degree murder “if the facts of the case could allow the jury to conclude that the defendant’s intoxication was so great that the defendant was unable to form the necessary intent.” *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995). If a defendant’s intoxication negated his ability to premeditate, then the defendant would be guilty of second-degree murder. See *People v Langworthy*, 416 Mich 630, 651; 331 NW2d 171 (1982).

Cooley does not deny that he killed Graves; however, he argues that there was insufficient evidence to allow the jury to conclude that he had formed the intent to kill her in advance of the killing. The Michigan Supreme Court has noted that “[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses.” *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). In the present case, the prosecutor demonstrated that Cooley did not act in self-defense and was sufficiently sober to premeditate killing Graves. For example, the jurors heard several police officers testify that Cooley did not appear to be intoxicated, that he obeyed orders when he was arrested, and that he lied during his May 26, 1998, interrogation. Further, the jurors heard Cooley testify that he lied to his girlfriend, Sharon “Renee” Ray, shortly after murdering Graves by telling Ray that he had been in a fight with drug dealers. Rosie Cooley, Cooley’s sister, testified that on the day of Graves’ murder, she heard Cooley tell Graves “Cathy, God damn it, give me the f-----g money” when Graves refused to give Cooley \$20, which could be construed as evidence of both motive and premeditation. Although Cooley claimed that he accidentally shot Graves, it is undisputed that he used two separate weapons, a knife and gun, to kill her, which tends to show that Cooley engaged in some thinking about the murder. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

Notably, the trial testimony revealed that Cooley stabbed Graves seven times and shot her point-blank in her left eye. Further, the medical examiner noted that two of the knife wounds were characteristic of defense wounds, suggesting that Graves attempted to prevent her assailant from stabbing her. See *Anderson, supra* at 538. The medical examiner also noted that one of the knife wounds on Graves' neck "would take an adult person using virtually all of his or her strength to draw the knife across the neck." Also, Cooley admitted at trial that he washed his hands after the murder and went to his wife's house in order to change his bloodied clothes. See *Haywood, supra* at 230 ("evidence of defendant's attempt to clean up the blood after the killing could be used to infer that he acted with deliberation and premeditation").

As the final judge of credibility, see *Lemmon, supra* at 637, the jury here chose to believe the prosecution's witnesses, as evidenced by its guilty verdict. Clearly, based on the direct and circumstantial evidence viewed in a light most favorable to the prosecution, a jury could find beyond a reasonable doubt that Cooley committed first-degree premeditated murder. *Kelly, supra* at 642. We will not interfere with the jury's decision to discredit Cooley's self-defense and intoxication defenses. *Wolfe, supra* at 514.

III. Ineffective Assistance Of Counsel

A. Preservation Of The Issue And Standard Of Review

Cooley argues that his defense counsel made two serious mistakes that violated his constitutional right to effective assistance of counsel. According to Cooley, he was denied the effective assistance of counsel because his attorney recommended that he refuse a plea offer, and because his attorney failed to interview two people who could have provided favorable testimony regarding his intoxication defense. At trial,¹ Cooley failed to request an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); therefore, this Court reviews his claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

B. Standards Relating To Ineffective Assistance Of Counsel

The Michigan Supreme Court adopted the United States Supreme Court's standard for reviewing ineffective assistance of counsel claims articulated in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994). Under *Strickland*, a defendant must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. *Strickland, supra* at 687. The defendant must first demonstrate that counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Then the defendant must demonstrate that counsel's deficient performance prejudiced the defense by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

C. The Plea Offer

Cooley claims that his defense counsel failed to advise him to accept the prosecution's plea offer of second-degree murder. "The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent necessary to permit the client to make an informed decision." *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). Counsel does not necessarily have to recommend whether to accept a plea offer because "[t]he test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea." *Id.*

Here, the lower court record is silent regarding the plea offer and what advice defense counsel gave to Cooley regarding the offer. Although Cooley has attached his own affidavit and the affidavit of his sister, Linda Harris, to his supplemental brief on appeal, he did not introduce the substance of those affidavits at a *Ginther* hearing, *McCrary*, *supra* at 478-479, and they are not a part of the record, MCR 7.210(A)(1). Therefore, the affidavits cannot alter our conclusion that his counsel provided the minimum amount of assistance necessary to be constitutional.

Furthermore, as the prosecution notes in its brief, Cooley "does not contend that counsel failed to inform him of the options available to him, rather, [he] merely contends that counsel was ineffective because counsel was wrong when he assured the defendant that the jury would not convict the defendant of first-degree murder." "The question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases." *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993). Because the lower court record is silent regarding the plea offer and what defense counsel told Cooley about the offer, Cooley has failed to demonstrate that defense counsel's advice was not within the range of competence demanded of attorneys in criminal cases. *Id.* Therefore, this claim fails.

D. Witness Interviews

Cooley claims that defense counsel failed to interview Harris and Lossie Cooley, who is his niece and Rosie Cooley's daughter, regarding his intoxication defense. The failure to interview witnesses does not, itself, constitute deficient performance. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Cooley has failed to show his attorney's failure to interview these witnesses "resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.* Moreover, the trial transcript reveals that defense counsel adequately supported Cooley's intoxication defense by attempting to present evidence that Cooley had been drinking all day on the day of Graves' murder. Therefore, Cooley cannot demonstrate that defense counsel's performance was deficient. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Even assuming that defense counsel's failure to interview various witnesses constitutes deficient performance, Cooley cannot establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *People v Johnnie Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The trial record is devoid of any proof that Cooley advised defense counsel of Harris and Lossie Cooley's potential testimony. Cooley never even mentioned Harris or Lossie Cooley

in his trial testimony. As a result, the record is silent regarding what Harris and Lossie Cooley in fact would have testified to regarding Cooley's intoxication defense. Thus, Cooley has not demonstrated that a reasonable probability exists that, if counsel had interviewed and called Harris and Lossie Cooley as witnesses, the outcome of the proceedings would have been different. See *Pickens, supra* at 312.

E. Conclusion

Each of Cooley's claims of ineffective assistance of counsel fails the two-pronged test in *Strickland* because defense counsel's performance was not deficient. Moreover, even if we were to find that defense counsel's performance was deficient in both claims, Cooley has failed to demonstrate that prejudice resulted.

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck

¹ This Court denied Cooley's motion to remand for a *Ginther* hearing based upon the same claims of ineffective assistance of counsel.