STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2002
V	No. 226306 Wayne Circuit Court
ANTHONY J. FRIERSON, Defendant-Appellant.	LC No. 99-006588

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of life imprisonment without parole for the first-degree murder conviction, twenty to forty years' imprisonment for the assault convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor's presentation of false evidence deprived him of a fair trial. Because defendant failed to preserve this issue by objecting at trial to the prosecutor's alleged misconduct, we limit our consideration of the issue to a determination whether a plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Our review of the record reveals no misconduct by the prosecutor. Defendant's argument involves an exhibit (trial exhibit 13A) consisting of a flattened bullet, a fragment, and seat cushion foam that the medical examiner removed from the deceased victim's body. The examiner testified that the autopsy of the victim's body during which the bullet and foam were recovered occurred on June 21, 1999, but the evidence tag attached to the exhibit reflected a date of June 20, 1999. While defendant suggests that this discrepancy reflects some purposeful deceit attributable to the prosecutor, we cannot conclude that the record substantiates anything other than an innocent mistake with respect to the date of the exhibit's recovery. Furthermore, we

cannot comprehend how defendant experienced any prejudice arising from the minor date discrepancy. *Carines, supra*.[1]

Defendant next asserts that insufficient evidence supported his convictions of first-degree murder and assault with intent to murder. This Court reviews a challenge to the sufficiency of the evidence by considering the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v DeKorte*, 233 Mich App 564, 567; 593 NW2d 203 (1999). To establish first-degree premeditated murder, the prosecutor must show that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). The elements of assault with intent to murder are that the defendant (1) committed an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The record belies defendant's claim that the prosecutor failed to establish that he fired the shots that injured two victims and killed another. Late on June 19, 1999, defendant and a friend picked up a rifle before going out to a club in the early morning hours of June 20, 1999. Defendant's friend observed him arguing with another club patron inside the restroom. At closing time, defendant requested that his friend give him the keys to their vehicle, in which the rifle was stored. On leaving the club, defendant's friend observed defendant in the middle of the street with a group of people, one of whom appeared to have been pushed to the ground. The friend watched defendant retrieve the rifle from their vehicle and head away yelling, "where they at, where are they at, there they go, they was with him too." Defendant's friend next heard four or five shots that sounded like they were fired from defendant's rifle.

One of the surviving victims, who drove the vehicle in which the other two victims were riding at the time of the shooting, testified that after being told to "pull off" away from the club, he looked back to observe defendant standing behind the vehicle and raising a rifle. Defendant began shooting, striking the driver with his first shot, striking the front seat passenger once, and striking twice and killing the back seat passenger. The victim who was driving later identified defendant from a photographic lineup.

Following the shooting, defendant explained to his friends that after someone had called his friend a "bitch" inside the club, he advised his friend to "just keep it cool" and that he "was going to take care of them later." Later on the day of the shooting, defendant told several people that he had killed one person and shot two others who were in critical condition, and told a friend that he needed to hide the rifle. Also later that day, defendant advised his cousin, "I think I done got me three victims."

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[1] Defendant correctly observes that the parties experienced some "confusion about exactly what should be included in Exhibit 13A." At some point during the proceedings, a bullet test fired from defendant's gun inadvertently was added to the flattened bullet and fragment within exhibit 13A. The record demonstrates, however, that after an extended discussion the confusion was resolved to the parties' satisfaction and the bullets were placed within the correct exhibit envelopes.

Because this evidence amply supported defendant's convictions of first-degree murder and assault with intent to murder beyond any reasonable doubt, we reject defendant's claim of insufficient evidence.[2] While defendant further suggests that other evidence showed that different individuals also possessed guns at the time of the shooting, we will not revisit the jury's determination which evidence to credit. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Defendant lastly argues that he received ineffective assistance of counsel. Because defendant failed to request that the trial court grant him an evidentiary hearing or new trial on the basis of ineffective assistance, our review of this claim is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. The defendant further must show that but for counsel's error the result of the proceeding would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. The defendant bears a heavy burden to overcome the strong presumption that his counsel provided effective assistance. *People v Rodgers*, 248 Mich 702, 714; ___ NW2d ___ (2001).

Defendant complains that defense counsel should have objected to "the police report/evidence tag that stated a bullet was taken from the deceased's body to the police department the day before the body was examined." As we have explained, no indication exists that the date discrepancy was the result of fraud by the police or prosecutor. Instead, the discrepancy appears attributable to a simple mistake. We will not second guess defense counsel's apparent strategic decision to forego any further inquiry into the date discrepancy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant next contends that defense counsel inadequately put forth evidence that on the night of the shooting defendant was robbed, which evidence would have supported a manslaughter instruction.[3] The record indicates that during his opening statement defense counsel advised the jury that "[y]ou'll hear testimony that [defendant] may have been robbed." The friend who had driven defendant to the club recalled that defendant told him after the shooting "that we had got [sic] robbed," and that he heard defendant tell another individual that during the robbery someone had pointed a gun at another friend's mouth. Defense counsel later inquired of an officer who looked inside the victims' vehicle whether the officer noticed a watch or other personal belongings inside the vehicle, but the officer did not recall. Subsequent

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[2] To the extent that defendant refocuses on the one-day date discrepancy between the medical examiner's testimony and the exhibit tag for the evidence removed from the deceased victim's body, we reiterate our rejection of this discrepancy as an error of any consequence for the reasons previously discussed.

[3] Defense counsel did request a manslaughter instruction on the basis that a confrontation might have occurred outside the club, but the trial court denied the instruction for a lack of evidence.

testimony from an evidence technician indicated that a man's watch was found inside the victim's vehicle.

This evidence reflects that defense counsel did in fact raise defendant's allegation of a robbery, which was developed to the limited extent possible without defendant's own testimony. Defendant criticizes his counsel's failure to ask the friend who drove defendant to the club whether the watch discovered inside the victim's vehicle belonged to defendant. We will not second guess defense counsel's strategic decision to attempt to discredit defendant's friend's testimony suggesting that defendant shot the rifle, which defense counsel did at length, instead of seeking to elicit further substantiation from the friend that defendant might have shot the victims over an allegedly stolen watch. The fact that defense counsel's strategy did not succeed does not qualify as ineffective assistance. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Defendant further challenges defense counsel's "fail[ure] to investigate the clothing with close range firing evidence found in the deceased's vehicle." Our review of the record demonstrates to the contrary that defense counsel posed several questions to the evidence technician regarding the clothes, but had to abandon the inquiries after the technician stated that he could not "tell . . . in terms of inches or feet . . . how far you'd have to be away in order to get . . . a powder burn."[4]

We find no deficient performance on the part of defense counsel. Even assuming, however, that defense counsel rendered ineffective assistance in each respect alleged by defendant, in light of the abundant evidence of defendant's guilt of the charged crimes we find it clear that none of defense counsel's actions prejudiced defendant. *Rodgers*, *supra*.

Affirmed.

/s/ Michael J. Talbot
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[4] Defendant raises one final complaint regarding counsel's performance, specifically that counsel "did not pursue" evidence of spent shell casings found in the victims' vehicle. We decline to address this issue in light of defendant's failure to even suggest what defense counsel should have done and why, and defendant's failure to explain how this alleged error prejudiced him.