STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2001
v	No. 217288 Oakland Circuit Court
ALAN DUANE LEWIN, Defendant-Appellant.	LC No. 98-159273-FC

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder and first-degree felony-murder, MCL 750.316; MSA 28.548, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a single term of life imprisonment without the possibility of parole for the first-degree murder conviction,[1] to be served consecutive to two concurrent two-year terms for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant's conviction arises from the shooting death of his ex-supervisor at a Speedway gas station in Royal Oak. He first argues that the trial court improperly allowed the prosecution to present testimony of other bad acts, contrary to MRE 404(b). Specifically, defendant challenges the introduction of testimony that he was fired from the gas station for alleged "cash shortages." Because defendant did not object to this testimony at trial, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Because the challenged evidence was relevant to defendant's motive for killing the victim, a proper purpose under MRE 404(b)(1), and the probative value of the evidence was not substantially outweighed by the potential for unfair prejudice, defendant has not demonstrated plain error. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

[1] The judgment of sentence was modified to properly reflect a single conviction of first-degree murder supported by two different theories. See *People v Bigelow*, 229 Mich App 218, 222; 581 NW2d 744 (1998).

Defendant next argues that the trial court erred in allowing a witness to present opinion testimony that defendant was not "trustworthy." Defendant asserts that the testimony was inadmissible under MRE 404(a). Again, defendant failed to preserve this issue with an appropriate objection at trial. Therefore, defendant must demonstrate plain error that affected his substantial rights. *Carines*, *supra*. Defendant has not done so. Considering the ambiguity of the statement and the other evidence presented at trial, defendant has failed to show that any error affected the outcome of the trial. Reversal is not warranted.

Defendant also complains of the introduction of video evidence of the outside of the station. The evidence was used to depict the angle and view from the car of a witness who drove by the station. This argument has no merit. At the time the prosecution sought to introduce this evidence, defense counsel was asked if he had any objection to the presentation of the video. Not only did defense counsel fail to object, he stated explicitly that he also wished to view the tape. "Counsel may not harbor error as an appellate parachute." *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Therefore, this issue does not warrant relief.

Defendant also argues that the trial court erred in allowing the prosecution to present the testimony of Lauralynn Thornton, claiming that it was improper rebuttal testimony. We disagree. This testimony was properly responsive to evidence presented by defendant, who had testified that he had never threatened to kill his supervisor at a previous job. The testimony was proper rebuttal testimony and the trial court did not abuse its discretion in allowing it. *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996); *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988).

Defendant next argues that trial counsel's failure to request an expert to help explain defendant's inculpatory statements to the police constituted ineffective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v Washington* 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Because defendant did not obtain a hearing to develop his claim, our analysis is limited to mistakes that appear in the trial record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).[2]

In the instant case, defendant has failed to show how counsel's failure to request funds for a psychological expert falls below an objective standard of reasonableness, nor is it apparent from the record that an expert would have helped defendant's case. Further, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, 237

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[2] We recognize that defendant requests that this Court remand now for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). However, defendant did not take advantage of the procedure established for requesting such relief. See MRE 7.211(C)(1)(a). Further, he gives this Court no basis for granting his relief at this time.

Mich App 74, 76; 601 NW2d 887 (1999), and defendant has presented no evidence to overcome that presumption. Ineffective assistance of counsel has not been shown.

Defendant also argues that the trial court erred by failing to *sua sponte* appoint an expert witness to explain his statements to police. Just as we found that there was no basis for concluding that counsel's decision not to request an expert was unreasonable, we find no basis in the record for concluding that the decision not to appoint an expert was unreasonable under the circumstances. Further, defendant cites no authority, and we are aware of none, that imposes on a court a duty to appoint an expert on behalf of a defendant without a showing by the defendant of the need for an expert. See *People v Carson*, 217 Mich App 801, 806-807; 553 NW2d 1 adopted 220 Mich App 662 (1996) (finding no abuse of discretion in refusing to appoint an expert on eyewitness identification when defendant had failed to make the requisite showing). No error is shown.

We affirm.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins