STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHARLES ALVIS JENNINGS,

Defendant-Appellant.

UNPUBLISHED
February 12, 2002

No. 223957
Berrien Circuit Court
LC No. 99-401362-FC

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

The present case arises out of a car-to-car shooting that occurred in Benton Harbor in April 1999. After a trial by jury, defendant was convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that there was insufficient evidence to support his conviction for first-degree murder because there was no evidence of premeditation or deliberation. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

"[T]o convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998); see also MCL 750.316. Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). The amount of time necessary to "measure and evaluate a choice before it is made is incapable of precise determination . . . ." *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Premeditation and deliberation simply require the defendant to have sufficient time to take a "second look." *Kelly*, *supra* at 642. "Though not exclusive, factors that may be considered to establish premeditation include the following: (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." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998).

In this case, we find that the evidence allowed a rational trier of fact to conclude beyond a reasonable doubt that defendant did premeditate and deliberate before killing Wesley Smith. First, defendant and Smith had a previous relationship, which was marked by animosity. By all accounts, defendant and Smith had a heated conversation at Meg's Hall, a banquet hall used for parties and dances in Benton Harbor. Two witnesses testified that defendant confronted Smith outside of Meg's Hall, and defendant himself even admitted that he confronted Smith after he was told that Smith was talking about "assassinating" him.

Defendant's actions before the murder and the circumstances of the killing likewise support a finding of premeditation and deliberation. Defendant's statement to police indicated that he left Meg's Hall and set out to arm himself and his friends with guns so that he could "take care of business." In fact, defendant obtained a .357 gun from one location and obtained a second gun from another location, which he was to give to Tommy Lewis. William Roseburgh, an acquaintance of defendant, testified that defendant told him he was going back to Meg's Hall to look for Smith because they had been in an argument earlier. Defendant did indeed return to Meg's Hall and waited for Smith for approximately ten minutes. When Smith did not return, defendant drove around Benton Harbor and eventually saw the car driven by Eric Gather, in which Smith was a passenger. In his statement to police, defendant indicated that he intentionally blocked Gather's car on the street to create a confrontation. Glen Reed testified that while riding in the car driven by Gather, the cars driven by defendant and Marcus Black followed them. After the car driven by Gather turned onto Union Street, it was blocked by these two cars. Joshawn Wilson, a passenger in Gather's car, testified that he observed defendant stick a gun out of the driver's window and shoot at them. Although defendant initially denied to police that he had any involvement with the shooting, he later admitted that after the shooting, he went to his girlfriend's house to hide the guns. He also testified that he emptied the shells from the gun and tossed them in a backyard.

We conclude that, after examining the evidence, a rational trier of fact could have concluded beyond a reasonable doubt that defendant did premeditate and deliberate before the shooting. We are mindful of the fact that some of the eyewitness testimony presented at trial was, at times, contradictory. However, in reviewing a sufficiency of the evidence issue, we must not interfere with the function of the jury to listen to testimony, weigh the evidence and credibility of the witnesses, and decide the questions of fact. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201; 489 NW2d 748 (1992). Ultimately, in this case, the jurors were presented with conflicting testimony and were required to determine the credibility of each witness, the weight to afford each witness' testimony, and whether to believe the testimony of a witness in whole or in part. We will not interfere with that determination.

Defendant also argues that there was insufficient evidence to support his first-degree murder conviction because there was no evidence that he fired the bullet that struck and killed Smith. Again, we disagree.

Defendant obtained a .357 gun. Several witnesses testified that after the cars met on a city street, defendant fired his gun at the car in which Smith was a passenger. A bullet struck the

trunk of the car and hit Smith, who was a backseat passenger. The copper metal jacket, found by police in the car in which Smith was a passenger, proved consistent with a .357. This is sufficient evidence for a jury to conclude that a bullet fired by defendant, from the gun he was carrying, was the bullet that penetrated the car trunk and struck Smith, killing him. Although there was some testimony that Black may have had a gun and fired gunshots, and that Tim Mason, a passenger in defendant's car, had a gun, possibly a .357, and had fired three or four gunshots out of the passenger window, as previously noted we will not usurp the jury's function of making credibility determinations when reviewing a sufficiency of the evidence issue. See *Wolfe, supra* at 414-415. Moreover, we must resolve all conflicts in the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant also argues that the testimony concerning the positioning of the cars indicates that defendant could not have fired the bullet that killed Smith. Again, defendant selects only a portion of the testimony to support his argument. However, this Court must examine all of the evidence in a light most favorable to the prosecution. *Reid, supra* at 466. Reed testified that defendant shot at the car driven by Gather as they drove by. Therefore, if the car driven by Gather had passed the car driven by defendant when defendant fired the gun, it is entirely feasible that the bullet would have entered the trunk of Gather's car. Consequently, defendant's argument in this regard is without merit.

II

Defendant next alleges that his trial counsel was ineffective for several reasons. As this Court explained in *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999):

> Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). Defense counsel's performance must be measured against an objective standard of reasonableness. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Mitchell, supra* at 163. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Finally, in making the testimonial record necessary to support a claim of ineffective assistance of counsel, the testimony of trial counsel is essential. *Mitchell, supra* at 168-169. The absence of such testimony limits this Court's review to what is contained in the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

To establish prejudice by ineffective assistance of counsel, "defendant must show 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, 314; 521 NW2d 797 (1994).

First, defendant argues that his trial counsel failed to conduct a pretrial investigation, i.e., failed to interview witnesses, retain a ballistics expert, investigate an accident defense, move for change of venue, move to suppress his statements made to police, and move for the trial judge to recuse herself. We find the record insufficient to review defendant's claim. There is simply no indication in the record regarding the type or extent of the investigation conducted by defendant's trial counsel. Thus, we consider defendant's claimed error waived. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). The record is likewise unsupportive of defendant's related argument that his trial counsel failed to adequately prepare him to testify and failed to consult with him about the defense theory of the case.

Defendant next argues that his trial counsel was ineffective in failing to call Cory Wright, Tommy Lewis, and Gregory Traylor to testify. Generally, decisions about which witnesses to call is a matter of trial strategy. *Rockey, supra* at 76. The failure to call a witness will not be considered ineffective unless it deprived defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996).

Here, defendant merely argues in general terms that the testimony of these witnesses would have "refuted the illicit testimony of Det[ective] Willie Mays." We conclude that the record is insufficient to conclude that defendant's trial counsel was ineffective in failing to call these witnesses. Defendant has neither adequately identified these witnesses nor detailed the substance and relevance of their expected testimony, and he has otherwise failed to articulate how these witnesses would have provided him with a substantial defense. Accordingly, defendant has not shown that a reasonably probability exists that, if counsel had called these witnesses, the outcome of the proceedings would have been different. See *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Further, defendant has failed to refute the presumption that defendant's trial counsel elected not to call these witnesses as a matter of trial strategy. *Rockey, supra*. In sum, we cannot conclude, based on the existing record, that defendant was prejudiced. *Strickland, supra; Pickens, supra.*

Defendant also argues that his trial counsel was ineffective because he failed to move for the trial judge to recuse herself. Defendant argues this should have occurred because the trial judge was also the district court judge in these proceedings and conducted the arraignment and preliminary examination. Defendant, however, fails to cite authority for the proposition that a trial judge cannot be the district court judge who conducted the arraignment and preliminary examination. Defendant cannot merely announce his position and leave it to us to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Next, defendant argues ineffective assistance of counsel because his attorney failed to move to suppress his statement to police. Interestingly, in one portion of defendant's brief, he argues that his statement should have been suppressed because it was involuntary; in another portion, defendant argues that the statement was fabricated by the police and that he did not make the statement at all. We find no evidence in the record to support defendant's claim that the police fabricated his statement. Similarly, there is no evidence on the record to support defendant's argument that his statement was involuntary. See, generally, *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Defendant spoke with police at 10:00 p.m. or 11:00 p.m. Admittedly, this interview occurred while defendant was in jail for the instant offense.

However, the interview only occurred after defendant requested that the police speak with him, and the totality of the circumstances surrounding the making of the statement indicate that it was freely and voluntarily made. Thus, defendant's argument fails.

Defendant further argues that his trial counsel was ineffective because he failed to appropriately cross-examine a witness, specifically Paul Tam, a pathologist. Defendant points out that Tam testified that the cause of Smith's death was bleeding to death. Defendant argues that this was a critical point for cross-examination because this testimony does not indicate that defendant caused Smith's death. This argument is meritless. Tam's testimony at trial indicated that he located a bullet wound on Smith's back. The bullet had entered Smith's back and traveled up into Smith's neck. Tam explained that the bullet tore a major artery and caused Smith to bleed to death, thus establishing that Smith died because of the gunshot wound. Consequently, there was no need for defendant's trial counsel to cross-examine Tam on this point and indeed, if defense counsel had done so, he may have lost credibility with the jury by arguing a point that was not disputable.

Finally, defendant asserts that his trial counsel was ineffective because he failed to object to the testimony of two police officers, Detective Sergeant Mays and Trooper Turner, which indicated that he had been in jail. In discussing this issue, defendant appears to frame the issue as one of impeachment under MRE 609. Defendant, however, fails to recognize that MRE 609 pertains to impeachment by evidence of the *conviction* of a crime. In this case, the testimony of Trooper Turner and Detective Sergeant Mays was devoid of any reference to defendant's convictions. Instead, the testimony of Detective Sergeant Mays only mentioned that defendant was in jail for the instant offense. We do not conclude that defendant's trial counsel was ineffective for failing to object to the reference to defendant being in jail for the instant offense. Defendant's trial counsel is not required to make futile objections. *People v Hawkins*, 245 Mich App 439, 456-457; 628 NW2d 105 (2001). Additionally, the testimony of Trooper Turner did not contain any reference to defendant being in jail. Instead, Trooper Turner simply testified that defendant was brought in at one point for questioning.

Having thoroughly reviewed the record, we conclude that defendant's numerous remaining allegations of ineffective assistance of counsel, including his claims that trial counsel failed to object to several instances of prosecutorial misconduct and failed to object to certain purportedly erroneous jury instructions, are unsupported by the record and without merit. Defendant has failed to overcome the strong presumption of effective assistance of counsel. *Rockey*, *supra*.

III

Next, defendant argues that the prosecutor engaged in misconduct on several occasions during the trial. We note that defendant did not object to any of these instances of misconduct. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). We review issues of prosecutorial misconduct case by case, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *Schutte, supra* at 721. The test is whether

defendant was denied a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

First, defendant argues that the prosecutor committed misconduct because by failing to produce certain res gestae witnesses. Although defendant does not identify these witnesses in his appellate brief, he does reference an attached exhibit which is a letter, dated July 12, 1999, requesting that the prosecution subpoena Cory Wright, Tommy Lewis, Gregory Traylor, and Marcus Black to testify. At a motion hearing before trial, the prosecutor represented to the trial court that subpoenas had been prepared for these witnesses and that service had been made or attempted. However, when the trial commenced, Black testified as a witness, but Wright, Lewis, and Traylor were not listed on the prosecutor's witness list or the amendments to this list and never testified. There is no explanation in the record regarding their absence from the proceedings. Significantly, at no time during or after the trial, including at sentencing, did defendant object to their absence or suggest that they should have been produced.

A prosecutor no longer has a duty to produce res gestae witnesses. As this Court explained in *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000),

> Before the amendment of MCL 767.40a; MSA 28.980(1), the prosecutor was required to exercise due diligence to produce an individual who might have any knowledge of the crime. The amendment of MCL 767.40a; MSA 28.980(1), 1986 PA 46, imposes a continuing duty on the prosecutor to advise the defense of all res gestae witnesses that the prosecutor intends to produce at trial. Put in other terms, the prosecutor's duty to produce res gestae witnesses was replaced with the duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance. [*People v*] *Burwick*, [450 Mich 281; 537 NW2d 813 (1995)] *supra* at 290-291.

A defendant must raise the issue regarding a prosecutor's failure to comply with this duty either in a motion for a posttrial evidentiary hearing or in a motion for a new trial in order to preserve it for appellate review. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996); *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). This Court has held that the issue was waived where the defendant "failed to move for a new trial, made no attempt to call the witness, and did not object to the witness' absence, seek to establish that the witness was a res gestae witness, or otherwise indicate to the court that he was dissatisfied with the absence of the witness." *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996), rev'd on other grounds, 456 Mich 352; 572 NW2d 195 (1998).

Here, as in *Jacques*, the record indicates that defendant and his counsel recognized, before the trial, that Wright, Lewis, and Traylor were potential res gestae witnesses, yet never at any stage of the trial court proceedings contested their absence. Thus, defendant has waived this issue on appeal. Moreover, defendant has not shown that the witnesses would have been favorable to his case. Therefore, even if the prosecutor failed to provide reasonable assistance in locating witnesses that defendant still wanted to call at the time of trial, defendant has not

demonstrated prejudice.[1] Given these circumstances, remand for an evidentiary hearing is not warranted. *Dixon, supra* at 409-410.

Second, defendant argues that the prosecutor engaged in misconduct by striking the sole African-American juror during voir dire. Defendant seems to be arguing that defendant was denied a fair trial because the prosecutor impaneled a jury "in a racially discriminatory fashion." Defendant did not raise this issue before the trial court. We decline to consider this issue where "defendant failed to raise the issue or to otherwise develop a record below that would provide us with sufficient facts to address the issue on the merits." *People v Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993).

Third and finally, defendant argues that the prosecutor engaged in misconduct for the following reasons: the prosecutor elicited from prosecution witnesses that defendant was in jail; the prosecutor used defendant's statement to police; the prosecutor constructively amended the information by referring to an uncharged offense; and the prosecutor referred to gang profile evidence during closing argument. Having reviewed the record, we conclude that these arguments are unfounded.

IV

The final issue raised by defendant concerns whether the trial court abused its discretion when it sustained the prosecutor's objections to defense counsel's questions during the direct examination of defendant. We review the decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

We note that defendant does not cite any particular portion of the trial transcript to support his argument. It is therefore difficult for this Court to determine precisely which evidentiary rulings are the focus of this appellate claim. However, few objections were made by the prosecutor during this part of the trial, and our review of the whole direct examination of defendant yields no error requiring reversal. The trial court did not abuse its discretion in sustaining the prosecutor's objections based on hearsay grounds and because the questions asked by defense counsel were in fact leading in nature. MRE 801 and 802; MRE 611(c)(1).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski

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[1] As we have noted in our evaluation of defendant's related ineffective assistance of counsel claim, see text *supra*, defendant has not overcome the presumption that his trial counsel elected not to call these witnesses as a matter of trial strategy.