STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2002
v	No. 225984 Wayne Circuit Court
RASCHID ZIMMERMAN, Defendant-Appellant.	LC No. 99-002112

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of two counts of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to thirty to fifty years' imprisonment for each of the second-degree murder convictions, and two years for the felony-firearm conviction. We affirm.

Defendant claims the trial court erred by admitting evidence of defendant's prior bad acts in violation of MCR 404(b). Defendant further claims that the trial court violated his due process rights by failing to rule on the prosecutor's motion to admit the bad acts evidence and because the prosecutor failed to give him adequate notice regarding the bad acts evidence.

In his motion regarding other acts evidence, the prosecutor requested the admission of testimony regarding a history of "bad blood" between defendant and one of the victims and evidence that defendant routinely carried guns prior to January 31, 1999. The trial court did not rule on the motion immediately following oral argument. However, the trial court specifically denied the admission of evidence regarding defendant's habit of carrying guns, finding it irrelevant because the witness' observation was too remote in time from the date of the murders. Further, defendant does not specify which evidence the trial court allegedly admitted regarding a history of drug transactions. Accordingly, defendant's claims regarding the trial court's admission of this evidence is without merit.

Defendant also asserts that certain other evidence admitted by the trial court was irrelevant and highly prejudicial. Specifically, defendant cites evidence that police officers found drugs at the scene of the crime and Sonja Crosby's testimony that she went to defendant's house to buy drugs on the night of the crime. First, defendant's implication that this evidence was part of the prosecutor's motion is a misrepresentation of the trial court record. Furthermore,

defendant forfeited this issue by failing to object to this testimony at trial. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). However, we note that defendant has also failed to explain on appeal how the admission of this evidence constituted error and how that error prejudiced him. Evidence that the police found drugs and money at the scene was clearly relevant to disprove defendant's theory that robbery was a motive for the murders. Moreover, Crosby's testimony that she went to the house to buy drugs did not constitute "bad acts" evidence, and it was clearly relevant to rebut defendant's alibi defense. We further note that defense counsel also elicited testimony that the apartment was a "drug house" and asserted that position during closing argument. Accordingly, defendant's bald assertion that he was prejudiced by this evidence is meritless.[1]

Defendant also alleges that the trial court erred when it admitted as an excited utterance Chancellor and Long's testimony that Hill said he won money from defendant in a dice game.

Under MRE 803(2), a hearsay statement is admissible if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2); *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). A statement is admissible as an excited utterance if "(1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event." *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999).

The record clearly reflects that gambling took place in the apartment and that Hill made the statement shortly after he won money from defendant. Further, Hill made the statement while laughing and holding a large amount of currency, which creates a strong inference that he just received the money and lacked the time or motivation to fabricate the statement. Under the circumstances, the trial court properly admitted the evidence under MRE 803(2).

Defendant raises several spurious claims that he was denied the effective assistance of counsel. Specifically, he argues that his attorney (1) presented no theory of innocence, (2) failed to investigate and present a defense, (3) failed to meet with defendant prior to trial, (4) gave defendant "false 'legal advice'" which caused him to unintelligently waive his right to testify regarding an alibi, (5) failed to impeach prosecution witnesses, (6) failed to learn from police that witnesses gave differing statements regarding the crime, failed to interview those witnesses and failed to present that evidence to the court.

"To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Further,

> A defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. Furthermore, this Court presumes that a defendant received effective

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[1] Defendant also fails to point to any evidence that the trial court considered any alleged "bad acts" evidence in its findings of fact or in its ultimate decision in the case.

> assistance of counsel, and the defendant bears a heavy burden to prove otherwise. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. 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. [*Id*. (citations omitted).]

"In attempting to persuade a reviewing court that counsel was ineffective, a defendant . . . must establish 'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Here, defendant failed to move for a new trial or evidentiary hearing before the trial court and did not file a timely motion to remand this case for an evidentiary hearing as permitted under MCR 7.211(C)(1)(a)(ii). *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Our review, therefore, is limited to mistakes apparent on the record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999); *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Accordingly, there is no basis to review defendant's claims that his attorney failed to meet with him prior to trial, gave him erroneous legal advice and failed to adequately investigate the case before trial because the record does not contain sufficient detail to support those allegations.

We also reject defendant's claim that defense counsel failed to present an alibi defense or other theory of innocence. On the contrary, defense counsel presented several theories in defense of the charges based on alibi, the lack of eyewitness identification and the lack of physical evidence linking defendant to the crime. Further, defense counsel vigorously attacked the credibility of the prosecution witnesses and argued that they gave self-serving, inconsistent or untruthful testimony. Contrary to defendant's assertions on appeal, the record also reflects that defense counsel attempted to impeach prosecution witnesses with prior inconsistent testimony and cross examined them regarding the inconsistencies in their statements to police. In sum, defendant has failed to meet his burden of showing that defense counsel's performance "fell below and objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *Garza, supra* at 255.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad