STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER HAMILTON,

Defendant-Appellant.

UNPUBLISHED
September 19, 1997

No. 180592
Saginaw Circuit Court
LC No. 93-007454-FC

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction for first-degree murder, MCL 750.316; MSA 28.548, in the stabbing death of a drug dealer in defendant's neighborhood. Defendant was sentenced to life in prison.[1] We affirm.

Defendant first contends that the evidence presented at trial was insufficient to sustain his conviction. We disagree. To support a conviction for first-degree murder, it is necessary to prove that defendant killed the victim, and that such act was willful, premeditated and deliberate. MCL 750.316; MSA 28.548; *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992); CJI2d 16.1. Premeditation and deliberation imply that an interval existed wherein a reasonable person could have taken a "second look," and may be inferred from the circumstances surrounding the killing, including (1) the prior relationship between the parties; (2) defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) defendant's conduct after the killing. *Id*. at 665-666.

The record here indicates that two eyewitnesses testified that, near the time of the murder, they saw defendant carrying a long knife and running away from the victim's house in the direction of defendant's own residence. Furthermore, no murder weapon was found at the scene and a subsequent search of defendant's residence later that same day yielded (a) an eight-inch-long butcher knife on which there was blood consistent with that of the victim (and only 2.9 percent of the population at large), the blade of which was consistent with both the victim's thirteen stab wounds as well as a bloody

* Circuit judge, sitting on the Court of Appeals by assignment.

knife impression recovered from the victim's couch and which defendant's mother had used to cook with the evening prior to the murder; (b) defendant's jacket, wet and hanging from a clothesline, containing an unidentifiable blood stain; and (c) defendant's boots, with the laces missing, on which there was also blood consistent with that of the victim. Defendant had also been heard prior to the murder angrily threatening to "get" the victim, and had sustained a fresh cut to his right palm sometime during the day of the murder.

Viewing the foregoing in the light most favorable to the prosecution, *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996), we cannot say that the evidence presented at trial was such that a rational jury could not have found it sufficient to prove the essential elements of first degree murder beyond a reasonable doubt. We note and reject defendant's argument that the evidence was insufficient to prove the elements of premeditation and deliberation. All evidence, including circumstantial evidence and reasonable inferences drawn therefrom, may properly support the elements of the offense. *People v Baker*, 216 Mich App 687; 551 NW2d 195 (1996).[2]

Defendant also contends that he was denied a fair trial owing to the erroneous introduction of incriminating electrophoretic blood evidence, arguing that such evidence was introduced without a proper foundation. We disagree. We first note that defendant failed to preserve this issue for appeal by timely objection, MRE 103(a)(1); *People v Mooney*, 216 Mich App 367, 378; 549 NW2d 65 (1996). However, we may nonetheless review an unpreserved, nonconstitutional allegation of plain error. *People v Grant*, 445 Mich 535, 552-554; 520 NW2d 123 (1994). We further note the testimony of the prosecution's serology expert, in which he detailed both his personal background and experience in the use of electrophoresis as well as the steps used to test the blood evidence in the instant case. As such, we cannot say that it was an abuse of discretion for the trial court to allow the presentation of such evidence. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). To the extent defendant argues that the trial court should have excluded this evidence on its own initiative, we note that the statute cited by defendant in support only implicates a court's duty to limit evidence to "relevant and material matters," MCL 768.29; MSA 28.1052, and does not contemplate the concept of evidentiary *foundation*. Here, it cannot be seriously argued that blood evidence linking defendant to the victim was either immaterial or irrelevant. Moreover, we reject defendant's contention that the specific criteria listed by this Court in *People v Gistover*, 189 Mich App 44; 472 NW2d 27 (1991), need be satisfied in order to establish a proper foundation for the admission of electrophoretic blood evidence. We note that the *Gistover* Court was attempting to set forth criteria by which the admissibility of electrophoretic blood evidence might be presumed; however, the Court clearly indicated that such measures were intended to be merely illustrative, and not, as defendant urges, absolute requirements. Indeed, the listed criteria were in fact nothing more than a recapitulation of "the safeguards that were actually implemented" in the particular circumstances of the *Gistover* case. 189 Mich App at 54, n 3.

Defendant next contends that the trial court improperly instructed the jury in three respects. We first note that defendant failed to preserve this issue for appeal by timely objection, MCR 2.516(C); *Ullah*, *supra* at 676, thereby foreclosing appellate review absent manifest injustice. *Id*. at 676-676, n 2.

Defendant first argues that the court's instructions erroneously informed the jury (1) that defendant had in fact stabbed the victim, rather than properly leaving such a critical factual determination to the jury; and (2) that the jury could find defendant guilty of both premeditated murder and felony-murder. We disagree. A review of the record reveals that the trial court's instructions as a whole more than adequately presented the issues and protected defendant's rights. *Id*. at 677.

With regard to the cause of the victim's death, the trial court instructed the jury with regard to one of the elements of the offense: "First, the defendant caused the death of Rico Martin. That is, that Rico Martin dies as a result of stab wounds." Defendant's counsel thereafter called to the court's attention the fact that this instruction did not specify that the jurors must find that the stab wounds were inflicted specifically *by* defendant. The trial court then further instructed:

> There is one minor correction that counsel has brought my attention to. In regard to Count 1—whether it would be first-degree premeditated murder or first-degree felony murder or second-degree murder, manslaughter—in order to find the defendant guilty, first you have to find the defendant caused the death and that Mr. Martin died *as a result of* the stab wounds inflicted *by* Mr. Hamilton. [Emphasis supplied].

During its instructions, the court also repeatedly informed the jurors that they were the sole factfinders in the case, that they must decide the case based only on the evidence properly admitted, that the statements, arguments and witness questioning of counsel were not evidence, that the trial court's comments, rulings, questions and instructions were not evidence and that they must disregard any perceived opinion of the trial court. Upon reviewing the instructions as a whole, it becomes clear that the issue of the cause of the victim's death was fairly presented to the jury.

Defendant nonetheless contends that the effect of the specific language in the original single sentence instruction was such that the court did not require that the jury determine that defendant had stabbed the victim, but rather improperly informed them that defendant had done so. All that remained, according to defendant, was for the jury to find that the victim's death resulted from the stab wounds. However, it is undisputed at trial that the victim's death was a result of multiple stab sounds to the chest. Given this, defendant cannot persuasively argue that reasonable jurors would nevertheless have concluded based on the court's corrected instruction that all they had left to decide was whether the stab wounds resulted in the victim's death and not whether defendant caused the stab wounds. Such confusion was even less likely given the trial court's characterization of its final instruction to the jury as involving "one minor correction."

With regard to the trial court's instruction on Count I that the jury could find defendant guilty of "premeditated murder, felony-murder, *or both*" we note that such was a verbatim recitation of CJI2d 16.25 ("Unanimity of Verdict on Premeditated Murder and Felony Murder"), and that such standard instruction does not implicate the prohibition against double jeopardy. Instead, double jeopardy only prevents multiple *sentences* for the killing of a single victim. See Commentary, CJI2d 16.25.

Defendant next argues that there was no evidentiary support for the trial court's instruction on flight. We disagree. The record indicates that the evidence presented at trial was more than sufficient to support a jury instruction regarding flight for which there must be only some evidence. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988).[3] Defendant refused an offer by the police of a ride to the police station and was later apprehended walking in the opposite direction than that of the police station. We find no manifest injustice arising from any of the trial court's instructions to the jury. *Ullah*, *supra* at 676-677, n 2.

Finally, defendant contends that he was denied the effective assistance of counsel at trial, first arguing that his counsel improperly raised two mutually exclusive defenses, effectively nullifying each. We disagree.

Defendant maintains that his counsel should not have raised a theory of self-defense during his opening statement (i.e., essentially admitting that defendant had stabbed the victim) and then later abandoning such theory in favor of reasonable doubt. The gravamen of defendant's argument is this: (1) because of the uncertainty regarding whether defendant should or would take the stand in the face of potential impeachment by the prosecution, it was premature for his trial counsel to present a theory of self-defense when he did and defendant's opening statement should have been reserved until later; and (2) having failed to reserve his opening statement until a later time, trial counsel compounded this mistake by abandoning the self-defense theory during trial and advising defendant not to take the stand to testify as to his self-defense.

Following a remand by this Court for a *Ginther* hearing, the trial court denied defendant's motion for a new trial. In support of this decision, the court stated:

> [We] find that trial counsel's opening statement outlining a self defense theory to the jury was a matter of trial strategy . . . Defendant had been informed prior to trial of the need for his testimony if the self defense theory was to be asserted. Initially giving assurances to his counsel that he would testify, defendant at some point and for reasons which are only speculative chose not to take the stand. It was defendant's choice to exercise his constitutional right not to testify that critically undermined the self defense theory. The defendant's choice left counsel little option but to proceed on a reasonable doubt theory so as to salvage at least some possibility of an acquittal.

We apply the "federal test" in reviewing claims of ineffective assistance of counsel. *People v Poole*, 218 Mich App 702, 717; ___ NW2d ___ (1996) (citing *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 [1994]). As recently stated by the Supreme Court:

> In order to establish ineffective representation, the defendant must prove both incompetence and prejudice. There is a strong presumption that counsel's performance falls within the "wide range of [reasonable] professional assistance"; the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.

> *The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential.* [*People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995) (emphasis added) (quoting *Kimmelman v Morrison*, 477 US 365; 106 S Ct 2574; 91 L Ed 2d 305 [1986] [citations omitted]).]

Thus, in order to establish ineffective assistance, defendant must first show that his counsel's performance fell below an objective standard of reasonableness, and such a showing must be made while avoiding the "distorting effects of hindsight." *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). We recognize, as the Supreme Court has, that "[w]hile not insurmountable, it is clear that this burden is highly demanding." *Reed*, *supra* at 390.

With regard to part (1) of defendant's argument (i.e., that his trial counsel should have waited to make his opening statement owing to "uncertainty" whether defendant would actually testify), defendant fails to point to anything in the record to indicate that there was any such "uncertainty" at the time trial counsel gave his opening statement. Rather, defendant only points out that his trial counsel was "aware" prior to giving his opening statement that defendant faced impeachment with prior convictions if he took the stand. However, we do not equate such awareness that impeachment is potentially available to the prosecutor with "uncertainty" about whether defendant should testify at all. Indeed, we find no basis to conclude that, *at the time he gave his opening statement*, *Reed*, *supra* at 391, defendant's trial counsel had any doubt that defendant would eventually testify (despite possible impeachment). Defendant cannot overcome the presumption that his trial counsel's decision to present a self-defense theory to the jury was sound trial strategy at the time the decision was made to do so. *Reed*, *supra* at 391.

Further, with regard to part (2) of defendant's argument (i.e., that, having presented a self-defense theory during his opening statement, his trial counsel was compelled to follow through on that theory), we also cannot agree. Given defendant's change-of-heart concerning his initial decision to testify, defense counsel had no alternative but to modify his trial strategies. See, e.g., *LaVearn*, *supra* at 216-217. We believe that he did so in a reasonable manner which tended, to the best extent possible, to minimize the abruptness of the change in strategy compelled by defendant's own actions. Rather, during his opening statement, defendant's trial counsel indicated that defendant struggled with the victim in self-defense and that the victim sustained fatal stab wounds. During closing argument, trial counsel only modified his argument to the extent that he offered the jury the theory that, although defendant and the victim had struggled and the victim sustained stab wounds, someone else present during the comings and goings that night actually killed the victim. The prosector's rebuttal acknowledged this theory and did not emphasize in any manner the disparity between trial counsel's remarks in his opening and closing statements.

That, in retrospect, it would have been a preferable course of conduct for defense counsel to have reserved his opening argument for a later time is to assess his performance by a standard of hindsight, a standard which is not relevant in assessing the effectiveness of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed2d 674 (1984). Defendant has not shown

that the actions of his trial counsel fell below an objective standard of reasonableness. *Reed, supra* at 391. We therefore cannot conclude that defendant was denied the effective assistance of counsel based on his trial counsel's presentation of both self-defense and reasonable doubt theories.[4]

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] Evidence was presented at trial that defendant assisted the victim with his drug-selling activities for which the victim paid defendant with drugs.

[2] We also reject defendant's contention that the trial court's instruction on a larceny charge (for which defendant was acquitted) was prejudicial. Even presuming arguendo that the larceny instruction was unsupported by the proofs, we find no possibility that, given the option of multiple convictions, the jury may have chosen to "only" convict defendant of first degree murder as a "compromise." See *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975).

[3] Defendant correctly points out that there may have been a completely innocent explanation for his actions, arguing that the evidence therefore did not show that he was actually fleeing from police. However, the existence of alternative interpretations of the evidence of flight is the very reason that the instruction is prescribed.

[4] Given our previous resolution of defendant's challenges to the admission of the electrophoretic blood evidence and the jury instructions, we also cannot say that defendant was denied the effective assistance of counsel insofar as these issues went unpreserved for appeal.