

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAPHAEL P. STRADWICK,

Defendant-Appellant.

UNPUBLISHED

September 17, 1999

No. 194258

Recorder's Court

LC No. 94-001659

Before: Doctoroff, P.J., and McDonald and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to mandatory terms of two years' imprisonment for the felony-firearm conviction, and life without parole for the first-degree murder conviction, the sentences to run consecutively. Defendant now appeals as of right. We affirm.

This case arises out of the fatal shooting of Gerald Wilson on October 30, 1993. Wilson and his girlfriend, Gia Marable, arrived at Gregory Wright's¹ house during that evening. Wilson entered the house followed by Edwin Culp while Marable waited in the car. A number of other individuals were also present at the house at this time. Several minutes later, a struggle ensued between Wilson and Wright in the presence of defendant and Culp. Wright instructed defendant to shoot Wilson, and defendant fired the revolver several times killing Wilson. Thereafter, Culp exited the house and informed Marable that "they just shot G," referring to Wilson; however, Culp did not indicate who "they" was. Immediately after the shooting, Wright noticed Marable waiting in the car and instructed defendant to kill her, but defendant did not comply and Marable left unharmed.

Later that evening, the police discovered Wilson's body lying on the ground in an alley near Wright's house. The police noticed a trail of blood leading from the body to Wright's house. The officers followed the trail of blood into the house, and after conducting a search did not find anybody inside, but did find several weapons and ammunition, as well as a blood stained leather jacket. These items were seized and preserved as evidence.

Several days later, the police paged Culp and Culp went to the police station and gave a statement regarding the incident. Culp's statement implicated defendant, and an arrest warrant was issued for defendant. The police were subsequently informed that defendant may have traveled to Toledo, Ohio, and thus, a federal unlawful flight warrant was issued. A few days later, defendant was discovered by a federal agent outside a residence in Toledo. Defendant was apprehended and transported back to Michigan.

At the time of trial, Culp was a federal fugitive and neither federal nor state authorities had been able to locate him. Since Culp's was the only testimony directly implicating defendant in the crime, the trial court conducted a due diligence hearing to determine whether Culp was "unavailable" for purposes of trial, and whether his preliminary examination testimony should be read into evidence. At the hearing, the prosecution presented testimony from a Detroit police officer and a special agent of the Drug Enforcement Administration regarding the efforts made to locate Culp independent of, and in conjunction with, preparation for defendant's trial. Importantly, a federal warrant had been issued for Culp's arrest, and checks with the local utilities and agencies, and at Culp's mother's home, failed to locate him. Despite concerns about the sloppiness of some of the pretrial efforts by law enforcement, the trial court found nevertheless that under the unique circumstances in this case, the prosecutor had exercised due diligence in attempting to locate Culp. Culp was therefore declared "unavailable" and his preliminary examination testimony was admitted into evidence.

On appeal, defendant raises a host of issues challenging his convictions and sentences. Because we are not convinced that any of the issues raised on appeal warrant reversal, we affirm defendant's convictions and sentences.

I.

Defendant argues that the trial court erred in excluding a portion of defense witness Emmett Glover's testimony explaining why he did not immediately report the shooting to the police. In addition, defendant contends that the trial court erroneously allowed the prosecutor to elicit testimony from defense witness Larry Davison that he did not report the incident to the police, but did contact defense counsel with relevant information concerning the shooting about six weeks prior to trial. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Contrary to defendant's assertion, Glover was permitted to testify at trial that the reason he did not report the incident to the police was because he received a telephone call from his mother that prompted him to "lay low." Glover further testified that he "laid low" because he "was scared" after he received certain information from his mother that his "life was threatened." Thus, the trial court permitted Glover to testify as to his state of mind which explained why he did not report the incident to the police.

Likewise, we disagree with defendant's argument that testimony regarding Davison's contact with defense counsel six weeks prior to trial, but failure to report his knowledge of the case to the police, was improperly elicited by the prosecutor. The record reveals that the challenged testimony was not offered for the improper purpose of insinuating that Davison was not a good citizen for not going to the police, or that he was fabricating the information. See *People v Lodge*, 157 Mich App 544, 548; 403 NW2d 591 (1987); *People v Lafayette*, 138 Mich App 380, 388-389; 360 NW2d 891 (1984); *People v Kraai*, 92 Mich App 398, 410-411; 285 NW2d 309 (1979). Rather, the context in which the questions were asked indicate the prosecution sought to establish the witness' bias in favor of defendant. Accordingly, the trial court properly admitted the evidence.

II.

Defendant argues that the trial court erred in concluding that the prosecutor exercised due diligence in attempting to locate Culp for trial, erred in declaring Culp an unavailable witness for trial, and erred in admitting Culp's preliminary examination testimony into evidence at trial. We disagree.

A trial court's finding of due diligence is a factual determination that will not be set aside on appeal absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). In addition, the trial court's decision to admit prior testimony of a witness is an evidentiary ruling that this Court reviews for an abuse of discretion. *Id.*; *People v Dye*, 431 Mich 58, 64-67, 89, 98-99; 427 NW2d 501 (1988); *People v Baskin*, 145 Mich App 526, 534; 378 NW2d 535 (1985).

Our thorough review of the record reveals that the trial court's finding that the prosecution exercised due diligence in its efforts to locate Culp for trial is not clearly erroneous. We agree with the trial court that when the local officer's efforts were considered in conjunction with the efforts of the federal agent, due diligence had been established. Indeed, the prosecution exercises due diligence if it puts forth a reasonable, good-faith effort to locate the witness, even if more stringent efforts may have produced the witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

In light of our conclusion that due diligence had been established, we find that the trial court's determination that Culp was "unavailable" to testify at trial under MRE 804(a)(5) was adequately supported by the record, and that the admission of Culp's preliminary examination testimony into evidence at trial pursuant to MRE 804(b)(1) was not an abuse of discretion. Nor are we persuaded by defendant's argument that Culp's preliminary examination testimony did not satisfy the "indicia of reliability" requirement for admitting prior testimony. The record does not disclose any reason to believe that Culp's testimony was fabricated or that he had improper motives for accusing defendant of shooting the victim. In any event, credibility issues simply affect the weight afforded to the evidence and are properly for the trier of fact to resolve; they do not affect the admissibility of the evidence.

III.

Defendant contends that the trial court erred in admitting evidence concerning unrelated firearms and ammunition and a photograph of a blood stained leather jacket found at the crime scene.

We review the trial court's decision to admit evidence for an abuse of discretion. *Adair, supra* at 485. In order for a weapon seized at a crime scene to be admissible at trial, the prosecution must show that the weapon was in defendant's possession and was the same kind of weapon as that used to commit the crime. *People v Kelly*, 386 Mich 330, 337-338; 192 NW2d 494 (1971).

Here, it is undisputed that the weapons and ammunition were not of the kind used in the instant shooting, and were not discovered in the presence of defendant or even in the same room as where the shooting occurred. Thus, although we recognize that evidence concerning the discovery of these weapons and ammunition may be consistent with the prosecution's theory that the shooting was in retaliation for a prior armed robbery against defendant and Wright, in the absence of such evidence substantiating the prosecutor's theory of motive, we find that the discovery of unrelated weapons and ammunition in the house is irrelevant and should not have been admitted. However, we conclude that in light of the eyewitness testimony implicating defendant as the shooter, and other evidence supporting the jury's finding of guilt, the admission of the challenged evidence was harmless and does not require reversal. *People v Crawford*, 458 Mich 376, 399; 587 NW2d 785 (1998); *People v Bone*, 230 Mich 699, 703; 584 NW2d 760 (1998).

We find that the trial court did not abuse its discretion in admitting the photograph of the blood stained leather jacket. There was testimony at trial that the blood stained leather jacket belonged to the victim. As such, the photograph placing the leather jacket on the floor beside where the victim was shot connects the victim to Wright's house where the crime was committed. The mere fact that a photograph depicts a gruesome detail of the nature of the crime does not, alone, render it inadmissible where it is otherwise admissible for a proper purpose. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998); *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). There is no evidence in the record that the photograph was introduced solely to arouse the sympathies or prejudices of the jury, which is clearly prohibited. *Id.* Accordingly, we conclude that the photograph was properly admitted.

IV.

Defendant argues that the trial court erred in admitting a statement made by Wright urging defendant to kill the victim's girlfriend who was waiting in the car outside the house where the victim was shot. Defendant contends that this statement was inadmissible under MRE 404(b) and 801(d)(2)(E). We disagree.

We review the trial court's evidentiary ruling for an abuse of discretion. *Adair, supra* at 485. MRE 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts when offered to prove the character of a person in order to show action in conformity with a particular characteristic. However, such evidence may be admissible for other purposes, such as intent, motive, knowledge, identity, or preparation. MRE 404(b). While we agree with defendant that such evidence would not be admissible to prove that defendant had a predisposition for criminal activity, we find that the evidence

was properly admitted to establish that defendant, acting in conjunction with Wright, premeditated the killing of Wilson, and were purportedly planning to kill Marable to cover their tracks. Therefore, the trial court did not abuse its discretion in allowing the prosecution to admit the statement under MRE 404(b) for the limited purpose of establishing the premeditation element of first-degree murder.

Our conclusion that the challenged statement was admissible under MRE 404(b) makes it unnecessary for us to consider defendant's argument that the testimony was inadmissible hearsay under MRE 801(d)(2)(E).

V.

Defendant argues that the trial court erred in failing to ascertain whether defendant knowingly and intelligently waived any potential conflict of interest arising from defense counsel's joint representation of defendant and former codefendant Wright at the preliminary examination. We disagree.

Defendant failed to object to the joint representation at the preliminary examination, and thus, has not preserved this issue for appellate review. In the absence of a proper objection at trial, this Court need not review the issue unless the failure to do so would result in manifest injustice. *Paquette, supra* at 340.

A conflict arising out of joint representation is not presumed or implied by the circumstances. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). The defendant must affirmatively establish that the joint representation adversely affected the adequacy of his representation. *Id.* The procedure a court must follow when confronted with joint representation is set forth at MCR 6.005(F); however, failure to follow this rule does not, alone, constitute error requiring reversal. *Id.* at 531; *People v Gamble*, 124 Mich App 606, 611; 335 NW2d 101 (1983). See *People v Washington*, 43 Mich 150, 151; 203 NW2d 744 (1972).

Here, defendant failed to establish that he was prejudiced by the joint representation at the preliminary examination, or that defense counsel rendered deficient representation. Moreover, defendant was represented by new counsel at all other stages of the litigation. Finally, the trial court denied defendant's motion to quash the bindover finding that there was nothing improper about the proceeding or defendant's representation. Accordingly, we conclude that no manifest injustice occurred here.

VI.

Defendant contends that the trial court erred in finding that Edwin Culp's statement to Gia Marable, "they just shot G," was admissible as an excited utterance. Specifically, defendant claims that Culp did not make the statement while he was still under the excitement or stress of the event. We disagree.

We review the trial court's admission of hearsay testimony for an abuse of discretion. *Adair, supra* at 485. In order for a statement to be admissible as an excited utterance, the proponent of the

statement must establish that (1) there was a startling event, and (2) the resulting statement was made while under the excitement caused by the event. MRE 803(2); *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). There is no set time limit for excited utterances. *Id.* at 551-552. Moreover, “[p]hysical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum.” *Id.* The trial court’s determination whether the declarant was still under the stress of the event is given wide discretion. *Id.* at 552.

The record shows that Culp exited the house moments after the shooting and told Marable to leave. After Marable drove away, Culp entered his vehicle, honked his horn and quickly pulled up beside Marable. Culp then said to Marable, “they just shot G.” Marable testified that Culp seemed edgy and nervous when he approached her. While some moments passed between the time of the shooting and Culp’s statement, from the record, we conclude, as did the trial court, that Culp was still under the stress of the event and that the lapse of time between the shooting and the statement did not afford Culp sufficient opportunity for fabrication. Accordingly, the trial court did not abuse its discretion in admitting the testimony as an excited utterance.

VII.

Defendant argues that the trial court committed judicial misconduct by characterizing defense counsel as being engaged in trickery. We disagree.

Defendant did not object to the trial court’s remark which he now claims is improper. To preserve for appeal an argument that the trial court committed misconduct during trial, a defendant must object to the conduct at trial. Absent a proper objection, this Court may decline to review the issue unless failure to do so would result in manifest injustice. *Paquette, supra* at 340.

Upon review of the record, we do not find the trial court’s remarks to be improper. Viewing the trial court’s remarks in context, the record does not demonstrate bias against defendant, or establish that the trial court’s comment pierced the veil of judicial impartiality. *Id.* To the contrary, the trial court’s comment reflects its efforts to control the conduct of the trial, and limit defense counsel’s repeated efforts to elicit hearsay testimony. See *People v McIntire*, 232 Mich App 71, 105; ___ NW2d ___ (1998). Accordingly, we find that the trial court did not engage in judicial misconduct, and no manifest injustice occurred.

VIII.

Defendant next argues that the prosecutor engaged in instances of misconduct during his rebuttal argument that denied defendant a fair trial. Defendant did not object to the portions of the prosecutor’s rebuttal argument that he now challenges on appeal. In the absence of an objection at trial, appellate review of prosecutorial misconduct is generally precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice does not exist if a curative instruction could have remedied the prejudicial effect of the misconduct. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Upon review of the record, we find nothing improper in the prosecutor's conduct. When viewed in the context of the entire rebuttal argument, the challenged statements were simply argument based on the evidence, and were made in response to the defense theories raised during closing argument. In any event, the trial court instructed the jury that the attorney's arguments were not evidence and could not be considered when deciding the issues in the case. Accordingly, we find is no manifest injustice, and we decline to further review the issue.

IX.

Defendant asserts that the trial court erroneously permitted the prosecutor to introduce evidence that defense witness Emmett Glover was also known by an alias. We disagree.

We review the trial court's decision to admit testimony concerning a witness' use of an alias for an abuse of discretion. *Adair, supra* at 485. There is a split of authority in Michigan regarding whether evidence of a witness' use of an alias is admissible to impeach the credibility of such witness. Compare *People v Pace*, 98 Mich App 714; 296 NW2d 345 (1980) (evidence that the defendant's brother used an alias was not improper where the inquiry was not emphasized in an attempt to discredit the witness through innuendo) with *People v Thompson*, 101 Mich App 609, 613; 300 NW2d 645 (1980) (impeachment by questions regarding use of a defendant's alias is not proper because the inquiry could be highly prejudicial and is not particularly probative of credibility) with *People v Bowens*, 119 Mich App 470, 471; 326 NW2d 406 (1982) (the prosecutor's questions regarding defendant's use of an alias were not only proper, but highly probative, and even if the evidence was inadmissible, any error was harmless because the questions concerning the defendant's alias were few and not inflammatory).

In this case, although there was no evidence that any other witness knew Glover by his alias, the inquiry into whether Glover used an alias involved only two questions and was not inflammatory. *Bowens, supra* at 473. Moreover, the prosecutor did not linger on Glover's use of an alias during the remainder of this cross-examination, and made only one brief reference to the alias during his rebuttal argument. Under these circumstances, we find no abuse of discretion in the admission of such testimony. Furthermore, even if the evidence was improperly admitted, any error caused by the limited reference to Glover's alias was harmless and did not prejudice defendant's case. *Id.*; *Thompson, supra* at 614.

X.

Defendant argues that the trial court erred in admitting evidence that defendant was arrested in Toledo, Ohio, several months after the incident, in a late model Mercedes, to establish flight, where the facts at trial did not support this theory. We disagree.

We review the trial court's decision to admit evidence of flight for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). While Michigan jurisprudence recognizes the equivocal nature of evidence of flight, evidence of flight is generally relevant and admissible as substantive evidence to show consciousness of guilt. *Id.*; *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993). See *People v Cipriano*, 238 Mich 332, 336; 213 NW2d

104 (1927). Nonetheless, evidence of flight, alone, is insufficient to sustain a conviction. *Coleman, supra* at 4. The term “flight” has been defined to include such actions as fleeing the scene of the crime, *leaving the jurisdiction*, running from the police, resisting arrest, and attempting to escape custody. *Id.* See 29 Am Jur 2d, Evidence, § 532, p 608.

In this case, the record shows that several months after the shooting occurred, defendant was arrested in a different jurisdiction than where the crime was committed. This evidence was probative of defendant’s state of mind following the shooting. Therefore, we find that the probative value of this evidence was sufficient to outweigh the potential for prejudice under MRE 403. The jury was free to decide whether to believe or discredit the evidence of flight as it related to defendant’s guilt. *Cutchall, supra* at 398. As such, we find that the admission of such evidence was not an abuse of discretion.

We likewise reject defendant’s argument that the admission of evidence relating that defendant was arrested in a late model Mercedes with Wright was inadmissible under MRE 404(b). Our Supreme Court has held that “testimony regarding the criminal action accompanying an escape or attempted escape is admissible because those actions are part of the *res gestae* of the incident.” *Coleman, supra* at 5. Moreover, the “fact that evidence of other criminal activities would generally be inadmissible under MRE 404(b) does not affect our holding.” *Id.* See also *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993) modified on other grounds 445 Mich 1205 (1994). The prosecution did not divulge any other details regarding ownership or possession of the vehicle, and did not improperly argue that defendant was involved in the commission of another offense at the time he was arrested. Thus, we conclude that the evidence establishing that defendant was discovered in a late model Mercedes was offered merely to explain the circumstances surrounding his arrest, not to suggest further criminal wrongdoing by defendant. Accordingly, the trial court did not abuse its discretion in admitting the evidence.

XI.

In a related argument, defendant contends that the trial court erred in admitting testimony from a federal agent regarding defendant’s arrest on a federal unlawful flight warrant that did not result in a conviction. For the same reason that we find that evidence of defendant being discovered in a late model Mercedes was properly admitted, we find that admission of the federal agent’s testimony regarding defendant’s arrest on the federal warrant was proper. This evidence was not introduced to show additional criminal wrongdoing, or that defendant had a propensity for crime; rather, the evidence was offered to explain the circumstances surrounding defendant’s arrest, and to explain why federal agents were involved in the arrest in the first place. In this regard, the jury was properly informed that the reason the federal warrant was issued was because of defendant’s flight from Michigan, not for some independent offense. Therefore, we hold that the trial court did not abuse its discretion in admitting the evidence.

XII.

Defendant argues that the manner in which the trial court conducted voir dire, particularly the way the court dismissed and replaced potential jurors in groups rather than on an individual basis, was a

variant of the prohibited “struck jury method” that mandates reversal. Defendant did not object during voir dire, or after the jury had been selected, to the manner in which the jurors were being seated or replaced. Moreover, when specifically given the opportunity to object to the jury as constituted defendant expressed no objection. Defendant’s failure to object to the process was an implicit acceptance of the jury. Where a party fails to object to the method of jury selection at trial, the issue has been waived on appeal. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998); *People v Lawless*, 136 Mich App 628, 636; 357 NW2d 724 (1984). In light of defendant’s failure to object to the jury selection process, any error in the procedure does not require reversal, and we decline to review the issue.

XIII.

Defendant contends that the trial court erred in failing to have the jury sworn in immediately after voir dire was completed, and instead waiting until the following day to administer the oath and preliminarily instruct the jurors. We disagree.

Upon review of the record, we find nothing improper with the manner in which the court administered the oath and instructed the jury, or the time at which this occurred. Moreover, defendant did not cite any authority in support of his argument. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *In re Coe Trusts*, 233 Mich App 525, 537; ___ NW2d ___ (1999). Accordingly, defendant has waived review of this issue. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

XIV.

Defendant next alleges numerous instances of instructional error. Claims of instructional error are reviewed by this Court de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions are reviewed in their entirety to determine if there is error requiring reversal. Even if imperfect, jury instructions are not erroneous if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998).

First, defendant contends that the court erroneously denied his request for a cautionary instruction on accomplice testimony where there was ample evidence from which a reasonable jury could conclude that Edwin Culp committed the crime. We disagree. Defendant requested an accomplice instruction premised on the theory that Culp assisted or cooperated in committing the crime, despite the defense theory of the case that defendant was not involved in the shooting. Defendant’s request for an accomplice instruction is logically inconsistent with his theory that he did not commit the offense because defendant cannot have an accomplice to a crime that he purportedly did not commit. Moreover, the evidence presented at trial did not support an accomplice instruction because there was no evidence that Culp participated in the shooting. Accordingly, an accomplice instruction was inappropriate and the court properly denied this request.

Second, defendant submits that the trial court erred in refusing to give a “mere presence” instruction. Contrary to defendant’s assertion, the evidence presented was that defendant was the perpetrator of the crime, not a mere bystander. Accordingly, a “mere presence” instruction was inappropriate.

Third, defendant argues that the trial court erred in giving an instruction on flight where the evidence did not warrant such an instruction. Defendant contends that there was no evidence from which the jury could have reasonably inferred that he fled the crime scene, ran from the police, or resisted arrest, simply because he was arrested in Toledo. Contrary to defendant’s assertion, the court did not err in giving an instruction on flight because the record clearly establishes that defendant fled to another jurisdiction after the offense was committed. See *Coleman, supra* at 4. Whether the fact that defendant was discovered and arrested in Ohio a few months after the shooting suggests a consciousness of guilt, *id.*, is a proper consideration for the jury.

Fourth, defendant argues that the trial court erroneously failed to instruct the jurors immediately after jury selection that they were not to discuss the case or begin deliberations until the conclusion of the trial. As we already noted, there was nothing improper about the court waiting until the following day before opening statements and proofs were presented to preliminarily instruct the jury. Thus, defendant’s claim of instructional error on this basis is without merit.

Defendant’s last two claims of instructional error relate to the court’s instructions on premeditation and reasonable doubt. However, defendant did not object to either of these instructions when read to the jury, and expressed satisfaction with the jury when asked by the court. Therefore, these claims have not been preserved for appeal, and we are not obliged to review them absent manifest injustice. After a thorough review of the record, we find no error with the court’s instructions on either the premeditation element of first-degree murder, or the reasonable doubt instruction given to the jury. Accordingly, there is no manifest injustice and we decline to review these claims.

XV.

Defendant next claims that that he was denied his constitutional right to effective assistance of counsel by certain deficiencies in trial counsel’s representation. Defendant did not move for an evidentiary hearing or a new trial on this issue. In the absence of a testimonial record to support the ineffective assistance of counsel claim, our review of this issue is limited to any errors that are apparent on the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Defendant’s claim of ineffective assistance of counsel is predicated on a number of alleged deficiencies by trial counsel, all of which we have already discussed and resolved in the preceding sections of this opinion. Because none of these issues warrant reversal, and defendant does not allege any deficiencies by defense counsel other than those asserted previously, we find that the record is devoid of any basis for relief due to alleged ineffective assistance of counsel. Defendant has not demonstrated any errors during trial requiring reversal, or that he was prejudiced by any of counsel’s actions or decisions. Moreover, defendant has failed to overcome the presumption that counsel’s decisions were simply a matter of trial strategy. *Stanaway, supra* at 687. Therefore, it is not apparent

on the record that defendant was denied a fair trial by counsel's representation, *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995), or that, but for counsel's conduct, the result of the proceeding would have been different, *People v Pickens*, 446 Mich 298, 302-302; 521 NW2d 797 (1994). Accordingly, we find no merit to defendant's argument.

XVI.

Defendant argues that his convictions should be vacated because he was denied his right to a speedy trial. Defendant claims that he suffered prejudice by the two-year delay because several of his key witnesses died or became unavailable before the matter proceeded to trial. We disagree.

Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. We review the trial court's factual findings for clear error, and the court's legal rulings de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). To determine whether a defendant has been denied his right to a speedy trial, this Court considers (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) any prejudice to the defendant. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *Gilmore, supra* at 459.

Defendant was arrested on January 28, 1994, and bound over for trial on the charges of first-degree murder and felony-firearm on February 9, 1994. On May 4, 1994, defendant filed a motion to quash the information on the basis that there was insufficient evidence of premeditation and deliberation. The circuit court granted the motion to quash on the first-degree murder charge, bound defendant over on second-degree murder instead, and set the trial date for August 8, 1994. Shortly thereafter, the prosecution sought an interlocutory appeal of the dismissal of the first-degree murder charge in this Court. In view of the expected delay resulting from the prosecutor's appeal, the circuit court granted defendant the right to bond. On June 20, 1995, a panel of this Court reversed the circuit court's ruling and reinstated the first-degree murder charge. *People v Stradwick*, unpublished opinion of the Court of Appeals, issued June 20, 1995 (Docket No. 176655). Defendant's trial in this matter commenced on January 22, 1996, approximately seven months after this Court's ruling.

Although defendant's trial in this matter was delayed over two years from the date of his arrest, the length of delay, alone, is insufficient to require dismissal. *Simpson, supra* at 564. Moreover, most of the delay in this case resulted from the prosecutor's appeal of the circuit court's dismissal of the first-degree murder charge, a process which the defendant set in motion by filing a motion to quash the information. In any event, the prosecution has a legal right to appeal a circuit court's decision granting a motion to quash and is not accountable for the subsequent delay pending this Court's decision. Indeed, the taking of an appeal by the State constitutes a good cause for delay, when carried out reasonably, and the time consumed on such appeal is not considered in derogation of a defendant's right to a speedy trial. *People v Chism*, 390 Mich 104, 113; 211 NW2d 193 (1973); *People v Missouri*, 100 Mich App 310, 321; 299 NW2d 346 (1980). Thus, because defendant does not argue that the amount of time expended during the prosecutor's appeal itself was excessive, and since after this Court issued its opinion reinstating the first-degree murder charge, the remaining delay was only seven months,

we find that the delay from the time the circuit court regained jurisdiction over this matter until trial was neither excessive nor unreasonable.

Furthermore, we are not convinced that defendant suffered any prejudice as a result of this delay. While defendant claims that he was prejudiced by the stress of incarceration and the restriction on his liberty pending trial, the record shows that defendant was released on a personal recognizance bond during the pendency of the prosecutor's appeal. Accordingly, defendant's liberty was in fact unrestricted, and his argument is without merit.

We further reject defendant's argument that his case was prejudiced by the loss of several witnesses during the delay, one of whom would have allegedly exculpated defendant of the offense. We note that when defendant's motion to dismiss for lack of a speedy trial was brought before the trial court, defendant did not raise the issue of lost or deceased witnesses in his motion or his brief in support of the motion, and did not otherwise raise the issue during trial. Rather, defendant simply argued that he was prejudiced by the delay because of his increased level of anxiety, and admitted that the possibility of further prejudice was difficult to assess. Therefore, the trial court was first informed that a potentially exculpatory witness was deceased at the sentencing hearing, after the court had already ruled on the motion. In the absence of particular evidence to support defendant's claim of prejudice, we find that the trial court properly denied the motion. When balancing the four factors, we are unable to conclude that defendant was denied his right to a speedy trial.

XVII.

Defendant argues that his non-parolable, mandatory life sentence for the first-degree murder conviction is unconstitutional because it is not an indeterminate sentence and it constitutes cruel and unusual punishment. We disagree.

Defendant did not object to the sentence imposed by the trial court; however, because defendant raises a constitutional challenge, this Court may review the claim absent a proper objection. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). We review constitutional issues de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). In addition, this Court reviews a trial court's imposition of a particular sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). An abuse of discretion will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Defendant's sentence of life imprisonment without the possibility of parole is statutorily mandated. See MCL 750.316; MSA 28.545; *People v Anderson*, 209 Mich App 527, 539; 531 NW2d 780 (1995). Therefore, defendant's argument that his sentence is unconstitutional because it is not an indeterminate sentence is without merit.

Furthermore, our Supreme Court has expressly ruled that a mandatory life sentence without the possibility of parole for an adult is not cruel or unusual punishment. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976). See also *People v Launsbury*, 217 Mich App 358, 363; 551

NW2d 460 (1996). Accordingly, we reject defendant's argument that his sentence constitutes cruel and unusual punishment.

XVIII.

In view of our resolution of the issues raised by defendant on appeal, we find no cumulative error requiring reversal of defendant's convictions and sentences. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Gary R. McDonald

/s/ Kurtis T. Wilder

¹ Gregory Wright, charged as a codefendant in this case, died before trial.