

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDOLPH DAVIS,

Defendant-Appellant.

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UNPUBLISHED

May 29, 2001

No. 219715

Wayne Circuit Court

LC No. 98-007920

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to do great bodily harm, MCL 750.84; MSA 28.279,<sup>1</sup> and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent sentences of mandatory life in prison for each of the two first-degree murder convictions and 80 to 120 months in prison for the assault with intent to do great bodily harm conviction, to be served consecutive to two years in prison for the felony-firearm conviction. Defendant claimed that he was denied the effective assistance of counsel, and this Court remanded the case for a *Ginther*<sup>2</sup> hearing. We affirm.

Defendant's primary argument on appeal is that his trial counsel's failure to file a timely notice of alibi defense deprived him of the effective assistance of counsel. We presume effective assistance of counsel, and a "defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). A defendant must not only demonstrate that counsel's performance was deficient, but also that the defendant was prejudiced by the deficiency. *Id.* Accordingly, a defendant must show that, but for his counsel's mistake, the factfinder would not have convicted him. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). In order to prove

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<sup>1</sup> Both the Order of Conviction and Sentence and the Judgment of Sentence apparently misstate the statute number as MCL 750.83; MSA 28.278, which is assault with intent to commit murder. Defendant was *charged* with that crime, but the parties do not dispute he was *convicted* of assault with intent to do great bodily harm.

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

ineffective assistance of counsel based on the failure to timely file a notice of alibi defense, a defendant must demonstrate that defense counsel failed to file an appropriate notice, and that favorable alibi testimony would have been provided, had trial counsel satisfied the statutory notice requirement. *Pickens, supra*, 446 Mich 327; *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995); *People v Armstrong*, 124 Mich App 766, 769-772; 335 NW2d 687 (1983).

Although defendant's attorney failed to submit a timely notice of an alibi defense, the trial court was prepared to allow the witnesses to testify. After discussing the matter with defendant, defendant's trial counsel represented to the court that her client no longer wished to present the alibi witnesses. Based on the record in this case, we conclude that defendant agreed with his trial counsel's decision to forgo the alibi defense, based on problems with the witnesses' statements, and common problems with alibi defenses. Because defendant agreed with the decision to abandon the alibi defense on the record, there is no need to examine the witnesses' testimony to determine whether it would have been favorable to defendant. To the extent that any of defendant's counsel's decisions underlying her advice to forgo the alibi defense were strategic in nature, we will not substitute our judgment for hers. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant also makes some vague allegations that his counsel failed to properly present witnesses in defendant's case in chief to refute and impeach the testimony of prosecution witnesses, failed to properly cross-examine prosecution witnesses, failed to meet with defendant to prepare his case for trial, and failed to confer with defendant regarding his preference that she withdraw as his attorney. Because defendant fails to present any legal argument or authority for the proposition that the alleged mistakes amounted to ineffective assistance of counsel, any such issues are not properly presented for our review, and are considered abandoned on appeal. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). Defendant fails to identify any specific incidents of error and, after an extensive review of the trial transcripts, we can find no merit in defendant's claims. Defendant's trial counsel aggressively cross-examined the prosecution's witnesses, arguing that the identification of defendant was unreliable and that there were other people with motives to harm the victims. She also established that things of value were left in the upstairs flat, arguing this was inconsistent with the prosecution's theory that defendant killed the victims during a robbery. She further demonstrated that the man who turned defendant in was motivated by the prospect of a reward, and that he was aware that he would not get the reward unless defendant was convicted.

Finally, we note that even if defense counsel's performance could be found deficient, in light of the overwhelming evidence of his guilt, defendant cannot show any resulting prejudice. Defendant was seen by several witnesses near the flat before and at the time of the murders. The victim's parents saw defendant clearly as they tried to prevent his fleeing the scene. One witness testified that defendant not only admitted the murders to him, but had earlier asked him to assist in the crime. Defendant presents no evidence that this testimony would have been overcome by a different defense strategy. Based on the record, we cannot find any instance of mistake, let alone

ineffective assistance of counsel. Accordingly, we conclude that defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ Patrick M. Meter