

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ TRAWETS SCOTT,

Defendant-Appellant.

UNPUBLISHED

January 21, 1997

No. 182235

Genesee Circuit Court

LC No. 94-049997-FC

Before: Jansen, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

Following a jury trial in the Genesee Circuit Court, 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 750.227(b); MSA 28.424(2). Defendant was sentenced to life without parole for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right and we affirm.

On appeal, defendant raises six issues, including three new issues raised in his supplemental brief filed in pro per. He argues that there was insufficient evidence to sustain his conviction of first-degree murder, that the prosecutor's closing argument impermissibly shifted the burden of proof, that he was denied due process where the lower court record fails to include the entire portion of the prosecutor's final argument, that the jury instructions were erroneous, that he was deprived the effective assistance of counsel, and that the cumulative effect of the errors denied him of a fair trial. We do not find any issue to require reversal.

I

Defendant first argues that there was insufficient evidence regarding the element of premeditation and deliberation to sustain his first-degree murder conviction. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most

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

favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of the crime of first-degree murder are that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a second look and may be established through consideration of the following surrounding circumstances: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Id.*

The record reveals that on the evening of February 16, 1994, defendant shot and killed twenty-one-year-old Tyrone Williams while they and James Crain were driving in Williams' Pontiac Grand Am in Flint. Crain testified that before the shooting he overheard defendant say that he could rob Williams. Without warning, defendant, who was riding in the back of the car, pulled out a gun and shot Williams in the head. After defendant climbed from the back of the vehicle to the driver's seat, Crain jumped out and defendant sped away. Within an hour, Crain called 911 from a relative's house and told the operator what happened. Crain indicated that on a previous occasion, defendant shot in Williams' direction after an argument over stereo speakers.

Flint Detective Sergeant Thomas Korabik testified that while conducting an interview at the police station that evening, defendant stated that he and Williams had problems in the past and referred to the incident regarding the stereo speakers. Defendant further stated that while riding in the Grand Am, he began thinking of the previous problems between the two, pulled out the gun, pointed it in the air, and said to Williams, "What's up now?" Defendant then lowered the gun and shot Williams in the head. Defendant explained that after Crain jumped out of the car, he continued to drive and threw the gun out of the car five houses down the road. Furthermore, defendant indicated that he had the gun in his right pants pocket before Williams picked him up that evening. The officer made a handwritten statement of this account, which defendant read and signed. Williams was found at a nearby school with gunshot wounds to the head and stomach. Blood and brain matter were discovered in the Grand Am.

We find that there was sufficient evidence presented of premeditation and deliberation. Defendant told an investigating officer that he placed the gun in his pocket before the victim picked him up that evening, and he confessed to pulling the trigger and shooting Williams. Defendant also admitted to pointing the gun in the air before shooting Williams. Furthermore, Crain testified that defendant and Williams had previously disputed over stereo speakers, and defendant admitted that he harbored ill-feelings against Williams. Defendant also shot Williams a second time in the stomach after driving the car from the scene of the first gunshot. A reasonable inference may be drawn from this evidence that defendant planned to shoot Williams before defendant entered the car and that he had an opportunity to "take a second look" before shooting. A reasonable inference also may be drawn from this evidence that defendant deliberately intended to kill Williams. When viewed in a light most favorable to the

prosecution, we find ample evidence that the elements of premeditation and deliberation were proven beyond a reasonable doubt.

II

Next, defendant argues that the prosecutor improperly shifted the burden of proof during his closing argument. Because defendant did not object at trial to any of the prosecutor's remarks, we will consider this issue only to redress a miscarriage of justice or if a cautionary instruction could not have cured the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The record reveals that the prosecutor merely argued that defendant intended to kill in a cold-blooded, premeditated, and deliberate manner. Such an argument amounts to nothing more than discrediting the defense, which is proper. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). Moreover, the trial court's instruction regarding the burden of proof cured any possible prejudicial effect from the prosecutor's closing argument.

III

Defendant next argues that he was prejudiced by an incomplete trial transcript of the prosecutor's closing argument. Again, he has not preserved this issue for review since he failed to seek relief in the trial court. *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993). Furthermore, defendant has failed to establish that the missing portion of the record has affected his ability to secure post-conviction relief. *Id.* Defendant merely states that it is possible that the missing portion of the record contains prejudicial statements by the prosecutor. Such speculation does not warrant reversal of defendant's convictions.

IV

In his brief filed in pro per, defendant first claims that the jury instructions were erroneous because the trial court did not instruct the jury on involuntary manslaughter. The trial court instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. Defendant did not request an instruction on involuntary manslaughter. A verdict shall not be set aside where the trial court fails to instruct on any point of law unless the accused requests such an instruction. MCL 768.29; MSA 1052; *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991). Accordingly, defendant is not entitled to any relief in this regard.

V

Next, defendant argues that he was denied the effective assistance of counsel. In order to prove a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Defendant first contends that counsel was ineffective because he failed to request jury instructions on involuntary manslaughter, accident, and careless, reckless, or negligent use of a firearm with death resulting. It was essentially defendant's theory that he did not have the specific intent to commit first-degree murder because he was intoxicated or high at the time of the shooting and that Williams was shot as the result of a struggle over the gun. Defendant gave two different versions of what happened in the car to the police. His second version was that he pulled the gun out from his pocket, held the gun in the air, and asked Williams "what was up" between them. Defendant then claimed that Williams grabbed his hand, defendant squeezed the trigger, and the gun went off. This was directly contrary to defendant's first police statement where defendant stated that he pulled the gun out of his pocket, held it up in the air, said to Williams, "What's up now?" and lowered the gun and shot Williams.

Defendant's contention that the shooting was accidental is totally contrary to the evidence presented. Williams was shot in the right side of his head, about two inches above the right ear and directly behind the temple. After Williams was shot in the head, defendant dumped his body outside of the car and shot him again in the right abdominal area. We note that Williams was sitting in the front driver's seat and defendant was in the back seat of the car. Yet, Williams was shot in the right side of the head, while a claim that Williams grabbed defendant's hand would certainly tend to indicate that Williams would have turned around and faced defendant. The physical evidence of the gunshot wound simply does not support this. Moreover, although defendant did make one claim that Williams grabbed his hand, his statement was that he (defendant) squeezed the trigger and there was no claim in the statement that Williams caused defendant to squeeze the trigger.

Defense counsel in this case was faced with a choice between defenses (intoxication, the shooting was provoked, and accident) with very significant evidentiary problems. One of defendant's own police statements, as well as the physical evidence, and the testimony of James Crain, all supported a first-degree murder conviction. Defense counsel sought out the two defenses, intoxication and provocation, that had the greatest likelihood of success in considering the evidence presented. "Nothing in the materials before us suggests that counsel was 'deficient' in making this choice or that the selection significantly affected the outcome of the trial." *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Therefore, we conclude that defense counsel was not ineffective for failing to request instructions on involuntary manslaughter, accident, or careless, reckless or negligent use of a firearm with death resulting. The evidence at trial did not support such instructions.

Next, defendant argues that counsel was ineffective for eliciting evidence from James Crain that served to buttress the prosecution's theory that defendant acted with premeditation and deliberation. The following colloquy occurred between defense counsel and Crain on cross-examination:

Q. Is Cortez one to be a bully on the street?

A. No.

Q. Has Cortez ever threatened you?

A. No.

Q. In your presence, has he ever threatened Tyrone Williams?

A. Yes.

Q. When?

A. About – about four months before that happened, he – you know, him and Tyrone exchanged words, as we was talking – me and somebody else was talking – Cortez shot his gun at Tyrone that day; shot at him, toward him, you know, shot toward him.

Q. What was the argument over?

A. I guess it was a kicker box they had previously argued over; a speaker box.

Q. And anything in particular about that speaker box we [should] know?

A. I don't know nothing about the speaker box.

Q. Okay, you said that you saw Cortez take a shot at Tyrone about four months prior?

A. Yes.

Q. You witnessed that?

A. Yes.

Q. You heard the shot?

A. Yes.

Defense counsel then went on to elicit testimony from Crain that Crain had indeed heard gunshots (on prior occasions) before Williams was shot, contrary to his testimony on direct examination.

Although counsel's questioning of Crain in this regard was not wise, in the context of Crain's testimony, it was not prejudicial to defendant. On direct examination, Crain had testified that defendant told him shortly before the shooting that he could rob Williams for his goods. Moreover, the prosecutor had already elicited testimony from the police officer who took defendant's statement that defendant

had told the police about the incident regarding the stereo speakers. Thus, Crain's testimony was merely cumulative. Defendant has failed to show that there is a reasonable probability that, but for counsel's cross-examination in this regard, the result of the proceeding would have been different. *Pickens, supra*, p 314. There was ample evidence shown by the prosecutor that defendant was guilty of first-degree murder. The cross-examination of Crain was not prejudicial to defendant.

Finally, defendant contends that defense counsel was ineffective for failing to present an alibi defense. There is absolutely nothing in the record to indicate that defendant had any viable alibi defense. Defendant admitted in his police statements that he shot Williams. Crain was also a witness to the shooting. The only question to be resolved was defendant's intent at the time of the shooting. Defense counsel was not ineffective for not presenting an alibi defense where there was no evidentiary support whatsoever for such a defense.

VI

Last, defendant argues that the cumulative effect of the errors justify a new trial. However, because we have concluded that there were no errors, we reject the argument that the cumulative effect of the errors requires reversal. *People v Wilson*, 196 Mich App 604, 610; 493 NW2d 471 (1992).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick