

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON HARRINGTON,

Defendant-Appellant.

UNPUBLISHED

August 1, 1997

No. 195503

Recorder's Court

LC No. 95-008238

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, and felony firearm, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, and to a two-year prison term for the felony firearm conviction, to be served consecutively. We affirm.

On appeal, defendant's first claim of error is that he was denied effective assistance of counsel. We disagree. Our review of this issue is limited to the record before us because defendant failed to request a hearing on his claim of ineffective assistance of counsel. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). In order for defendant to sustain his burden of establishing ineffective assistance of counsel, he must establish both that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant was prejudiced. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, the defendant must establish that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant argues that his trial counsel waited until the morning of trial to prepare his defense, and thus the attorney did not learn of a potential defense of diminished capacity until that time. Defendant argues that due to counsel's delay and failure to properly prepare, the attorney was forced to request an adjournment on the first day of trial in order to schedule a psychiatric evaluation for

defendant, a request which the trial court promptly denied. Defendant claims that counsel's deficient performance deprived him of a substantial defense. We disagree.

The limited record before us indicates that defendant waited until the week before trial to inform counsel that he (defendant) drank a substantial amount of alcohol on the day the murder occurred. Defense counsel could not have known this fact unless defendant himself offered the information. The written statements given by the witnesses apparently indicated that only social or casual drinking was going on among those persons present at the time of the killing. After defendant offered the new information to his counsel, the attorney requested an adjournment for the purpose of preparing a diminished capacity defense. At that stage of his representation of defendant, this was a reasonable course of action by the trial attorney. The trial court denied defendant's eleventh-hour request to adjourn. We agree with the trial court that defendant's own negligence caused the loss of the diminished capacity defense, not counsel's performance. The record reflects that even in light of the trial court's refusal to adjourn, counsel pursued an intoxication defense at trial. Defendant has failed to show that his trial counsel's performance fell below an objective standard of reasonableness.

Defendant also argues that the trial court erred when it denied his request for an adjournment. Again, we disagree. A trial court's decision to grant or deny a request for an adjournment or continuance is discretionary and will not be reversed on appeal absent an abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). In determining whether a trial court has abused its discretion in denying a defendant's request for a continuance or adjournment, this Court should consider whether: (1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion. *Id.* As set forth above, defendant was negligent in bringing his diminished capacity information to counsel's attention. Moreover, defendant has failed to demonstrate prejudice. Even though defendant did not present a diminished capacity defense, defense counsel argued throughout trial that defendant was intoxicated at the time of the offense and therefore could not form the specific intent required for a first-degree murder conviction. We find that the trial court did not abuse its discretion when it denied defendant's last-minute request for an adjournment.

Next defendant argues that the trial court erred when it admitted grisly photographs of the victim and the crime scene. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). We will find an abuse of discretion only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

The photographs admitted in the instant case showed the victim's body lying in an alley where defendant left the body, and depicted the gunshot wound to the victim's head. The testimony at trial established that defendant shot the victim in the head with a rifle from close range, then ordered several witnesses to assist him in moving the body from a bedroom in the house to the alley outside. Defendant incorrectly asserts that his actions after the killing were not relevant to the issue of premeditation. Premeditation is an essential element of first-degree murder. *People v Schollaert*, 194 Mich App 158,

170; 486 NW2d 312 (1992). A defendant's actions both before and after the killing, including motive, acquisition of the weapon and covering up the crime, may be considered when determining whether premeditation existed because such factors may show a plan or scheme for committing the murder. *People v Alexander*, 76 Mich App 71, 83; 255 NW2d 774 (1977). Hence, we find that the photographs were relevant to whether defendant premeditated the murder. The photographs also corroborated the testimony of the prosecution's witnesses regarding how the murder happened and the events which took place afterwards. We conclude that the probative value of the photographs was not substantially outweighed by their potential prejudicial effect. The trial court did not abuse its discretion.

Defendant next contends that the trial court erred when it admitted evidence of other bad acts pursuant to MRE 404(b). We decline to review this issue because defendant failed to object to the admission of the evidence and, moreover, the evidence of which defendant complains did not fall under MRE 404(b).

Next defendant claims that the prosecutor's misconduct in displaying a rifle wrapped in paper, which was never offered for admission into evidence, on counsel's table along with other admitted evidence on the first day of trial, denied him a fair trial. We disagree. Our review of allegedly improper prosecutorial conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because there was no mention of the rifle until defendant's closing argument, no miscarriage of justice resulted. In closing, defendant argued that the prosecution failed to meet its burden of proof since it did not produce the murder weapon, and since it did not link the bullet found at the scene of the crime to the mystery rifle displayed on counsel's table. Only after closing arguments were concluded did defendant object to the presence of the rifle on the table on the first day of trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). We will not allow defendant to argue the presence of the rifle to his advantage, and then object to its presence on appeal.

Finally, defendant claims that the trial court erred when it denied his request for an instruction on voluntary manslaughter. However, such an instruction was not warranted by the evidence produced at trial. Voluntary manslaughter is a cognate lesser included offense of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). If the defendant requests an instruction regarding a cognate lesser offense and the evidence supports it, the trial court must give the instruction. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993).

The crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down. Michigan Criminal Jury Instructions, Second Edition, CJI2d 16.9. Defendant argues that the jury should have been allowed to decide whether evidence that defendant's girlfriend's house was showered with bullets on the day of the murder by a rival gang was adequate provocation reducing the crime to voluntary manslaughter. However, defendant never advanced a provocation theory at any point during the trial, but instead presented an intoxication defense. It is likely that a voluntary manslaughter instruction would have confused the jury because the instruction alone would have presented a whole new theory of the case. Moreover, the court instructed the jury regarding both first-

degree murder and second-degree murder. The fact that the jury had the option to convict defendant of the lesser charge of second-degree murder, but did not, indicates that any error in not giving a voluntary manslaughter instruction was harmless. *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin