STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW JACKSON LAMBERT, JR.,

Defendant-Appellant.

UNPUBLISHED
January 13, 1998

No. 195145
Recorder's Court
LC No. 95-006237

Before: Gage, P.J., and Murphy and Reilly, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of first degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.82; MSA 28.277, and felony firearm, MCL 750.227b; MSA 28.424(2). This appeal of right is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, by appointed counsel, first contends that his Fourth Amendment rights were violated when police entered his home in the nighttime, without a warrant, to arrest him for these crimes. The evidence at the evidentiary hearing, however, established that, after knocking on the door and seeking entrance, the police were given permission to enter by defendant's younger brother, a resident of the home. This consent was valid, *Illinois v Rodriguez*, 497 US 177; 110 S Ct 2793; 111 L Ed 2d 148 (1990), and excuses the necessity for a warrant. Upon entry, the police encountered defendant's father, the owner of the home, who made no effort to either retract their permission to enter or to limit the scope of that permission; to the contrary, when an inquiry was made of him as to defendant's whereabouts, he identified the location of defendant's bedroom. *Cf. People v Powell*, 199 Mich App 492; 502 NW2d 353 (1993). Defendant's Fourth Amendment rights were therefore not violated because entry to the home for the purpose of effectuating an arrest of defendant was by consent, and the subsequent seizure of evidence was the product of a search incident to a valid arrest. *People v Arterberry*, 431 Mich 381, 386; 429 NW2d 574 (1988).

Defendant's second argument is that his post-arrest statement to police, after *Miranda* warnings, is both fruit of the poisonous tree, *Wong Sun v United States*, 371 US 471, 484; 83 S Ct

407; 9 L Ed 2d 441 (1963), and was, as a matter of fact, involuntary. As the defendant's arrest and the accompanying search and seizure of the area subject to his immediate control was not the product of any Fourth Amendment violation, there is no poisonous tree to serve as the predicate for the first prong of defendant's argument. As to voluntariness, the trial court's finding of historical fact, which this Court reviews only for clear error, is that defendant's testimony at the evidentiary hearing on this issue was not credible. The credible evidence was that defendant was advised of his *Miranda* rights, agreed to speak with the police officer, and made a statement which he thought might be helpful to his cause. The trial court's findings of historical fact are not clearly erroneous, *Thompson v Keohane*, 516 US ___; 116 S Ct 457; 133 L Ed 2d 383 (1995); see also *Ornelas v United States*, 517 US ___; 116 S Ct 1657; 134 L Ed 2d 911 (1996), and under the totality of the circumstances, defendant's statement was voluntary. *People v Cipriano*, 431 Mich 315, 338-339; 429 NW2d 781 (1988).

In a *pro per* supplemental brief, defendant contends that the evidence at preliminary examination was insufficient to establish the necessary element of premeditation. Assuming *arguendo* the truth of this assertion, any such error was clearly harmless, as there is no contention that sufficient evidence of premeditation was not introduced at trial, or that trial was otherwise not error free. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996); *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990).

Finally, defendant contends that the trial court erred in permitting him to represent himself at trial without first determining that defendant understood the associated dangers and disadvantages of self-representation. *People v Holcomb*, 395 Mich 326, 336-337; 235 NW2d 343 (1975). However, what actually occurred was that defendant was represented by counsel throughout trial. Counsel completed cross-examination of one of the State's witnesses, whereupon defendant interjected to object that his counsel had failed to pose questions of the witness which defendant desired to have answered. Such strategic decisions are properly within counsel's control, and no claim is made that counsel's representation was constitutionally ineffective. The trial court could properly have overruled defendant's objection, because defendant has a constitutional entitlement to represent himself or to be represented by counsel, but not both. *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994); *People v Lane*, 453 Mich 132, 138; 551 NW2d 382 (1996). Instead, the trial court permitted defendant to ask these questions himself, and thus defendant had the full benefit of both representation by counsel and supplementation of that representation through self-representation. Such largesse by the trial court in no way infringed or adversely impacted upon defendant's Sixth Amendment right to counsel.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Maureen Pulte Reilly