STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHADWICK ROBERT WIERSMA,

Defendant-Appellant.

UNPUBLISHED
June 26, 1998

No. 199666
Kalamazoo Circuit Court
LC No. 96-000927 FC

Before: MacKenzie, P.J., and Whitbeck and G.S. Allen, Jr.*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated 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). Before trial, defendant pleaded guilty to seven counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of felonious assault, MCL 750.82; MSA 28.277, one count of being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was also convicted of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant appeals as of right. We affirm.

First, defendant claims that the trial court erred in admitting his statement to a detective. Defendant argues that the statement was inadmissible because the interviewing detective discouraged him from exercising his right to speak with an attorney. We disagree.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 294 (1966). An accused must invoke his Fifth Amendment rights by clearly requesting an attorney; an "ambiguous or equivocal reference to an attorney" is not sufficient. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995), quoting *Davis v United States*, 512 US 452; 114 S Ct 2350; 129 L Ed 2d 362, 372-373

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

(1994). The police need not refrain from questioning simply because the suspect might want an attorney. *Granderson, supra,* p 678.

In this case, after defendant was informed of his rights, he asked the interviewing detective whether he should seek legal counsel. The detective replied that at some point defendant should definitely seek legal counsel. We conclude that defendant's question was not a clear invocation of his right to an attorney, and the detective's reply did not amount to discouragement to the extent that defendant was coerced into waiving his rights or was precluded from acting voluntarily. The trial court did not err in denying defendant's motion to suppress the statement.

Next, defendant claims that he was denied the effective assistance of counsel. Defendant cites several instances of alleged incompetence, and claims that, but for defense counsel's alleged errors, he would have been acquitted.

Because defendant did not move for an evidentiary hearing or new trial on the basis of ineffective assistance of counsel, review is limited to mistakes apparent on the record. *People v Nantelle,* 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms, and that the deficient performance prejudiced the defense. *People v Mitchell,* 454 Mich 145, 156; 560 NW2d 600 (1997).

We have reviewed defendant's claims and find them to be without merit. The record is devoid of any information from which this Court could conclude that defense counsel was incompetent for failing to (1) present additional evidence on the issue of intoxication, (2) pursue an insanity defense, or (3) enforce defendant's discovery rights. Moreover, even assuming defense counsel was deficient, on the basis of the record before us, we cannot conclude that there is a reasonable probability that, but for any error, the outcome of the proceedings would have been different. See *Mitchell, supra,* p 167. Defendant has failed to overcome the presumption that defense counsel provided effective assistance. *Id.,* p 156.

Defendant also claims that the trial court erred in failing to grant his motion for substitute counsel. However, a review of the record convinces us that the trial court did not abuse its discretion in ruling that defendant failed to show good cause for substitution. See *People v Mack,* 190 Mich App 7, 14; 475 NW2d 830 (1991).

Defendant next contends that the prosecution failed to satisfy its burden of proving that he was sane at the time of the offense. However, as of 1994, insanity is an affirmative defense, and the burden was on defendant to prove by a preponderance of the evidence that he was insane. MCL 768.21a; MSA 28.1044(1); see also CJI2d 7.11. As a result, the prosecutor had no burden to prove defendant was sane.

Defendant further argues that the prosecution failed to present sufficient evidence of motive and premeditation to support his conviction. We disagree.

We review the sufficiency of the evidence presented in a light most favorable to the prosecution and determine whether the evidence, and all reasonable inferences arising therefrom, is sufficient to allow a rational trier of fact to find each element of the crime beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Contrary to defendant's claim, motive is not a necessary element of first-degree murder. Premeditation and deliberation may be inferred from the circumstances, including defendant's conduct before and after the crime. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). The length of time necessary to establish premeditation and deliberation is incapable of precise determination; all that is necessary is enough time to take a "second look" at the actions contemplated. *Id*.

Viewing the evidence in a light most favorable to the prosecution, defendant had been in a long-term relationship with the victim's daughter, who recently broke off the relationship. Defendant was upset at the victim's daughter for ending the relationship and flirting with other men at a nightclub. About a week prior to the shooting, defendant asked a coworker for assistance in obtaining a gun. Just hours before the shooting, defendant asked a friend if he had ever thought about killing someone. Defendant then stole a loaded .9 mm handgun, which he knew how to fire, from a friend and took it to the victim's home. Defendant walked up behind the victim, pointed the gun at the back of the victim's head, and fired one shot from less than a foot away. After the shooting, defendant stated that he was upset with the victim's daughter and planned on killing the whole family and then himself.

From the above evidence, a rational trier of fact could have found beyond a reasonable doubt that defendant went to the scene of the offense planning to kill the victim and his family, and had ample time to take a second look at his contemplated action. Defendant's conduct before and after the shooting is sufficient to support the jury's finding that he acted with premeditation and deliberation when he shot the victim.

Next, defendant claims that he was denied a fair trial by prosecutorial misconduct. Defendant argues that the prosecutor improperly introduced details of the sexual offenses to which he previously pleaded guilty. Defendant did not object to any of the allegedly improper conduct. Therefore, appellate review is precluded absent a miscarriage of justice or unless a curative instruction could not have eliminated the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because the prosecutor's questions and the witnesses' answers were relatively innocuous, and because the jury was properly instructed as to the limited use of the "other crimes" evidence, reversal is not required.

Last, defendant argues that the cumulative effect of the errors at trial denied him a fair trial. We disagree. See *People v Wilson*, 196 Mich App 604, 610; 493 NW2d 471 (1992). After a review of the entire record, we are satisfied that defendant received a fair trial.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.