

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

L.C. BROWN,

Defendant-Appellant.

UNPUBLISHED

April 2, 1999

No. 191146

Recorder's Court

LC No. 94-010112 FC

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the second-degree murder conviction and a consecutive two-year term for felony-firearm conviction. He appeals as of right. We affirm.

Defendant first contends that the trial court erred in excluding his codefendant's police statement from evidence. We disagree. The determination whether a statement is against the declarant's penal interest presents a question of law, and the de novo standard of review applies. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). The clearly erroneous standard is applied in reviewing the trial court's findings of fact, and an abuse of discretion standard applies in reviewing the trial court's decision to exclude the evidence. *Id.* at 269. In exercising its discretion, the trial court must conscientiously consider the relationship between MRE 804(b)(3) and a defendant's constitutional due process right to present exculpatory evidence. *Id.* Likewise, appellate review necessarily requires a review of the importance of the statement to the defendant's theory of defense in determining whether the trial court abused its discretion by excluding the evidence. *Id.*

Here, the trial court did not abuse its discretion in excluding the evidence. The codefendant's statement did not involve a statement against the declarant's penal interest. Therefore, MRE 804(b)(3) is inapplicable. Further, unlike *Chambers v Mississippi*, 410 US 284, 300-302; 93 SCt 1038; 35 LEd 2d 297 (1973), this was not a situation involving either a self-incriminatory confession or clearly

exculpatory evidence, critical to the defense. Thus, defendant's claim that his due process rights were violated is without merit.

Defendant next contends that the trial court erred in denying his motion for a directed verdict of the first-degree murder charge. He also contends that there was insufficient evidence to support his second-degree murder conviction. We disagree. This Court reviews the denial of a motion for a directed verdict and a sufficiency of the evidence claim by reviewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found the essential elements of the charged offenses proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Harris*, 190 Mich App 652, 658; 476 NW2d 767 (1991).

Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.* Premeditation may be established through evidence of the following factors: (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.*

In this case, the evidence of a prior dispute between the codefendant and the decedent, coupled with evidence of prior threats by the codefendant to have someone kill the decedent, and the evidence describing the circumstances of the shooting, viewed in a light most favorable to the prosecution, was sufficient to infer premeditation and deliberation. Accordingly, the trial court properly submitted the first-degree murder charge to the jury. Further, defendant's contention that the facts mitigated the offense to manslaughter, and failed to establish second-degree murder, is similarly without merit. From the facts, the jury could find that defendant and his codefendant planned the killing. Accordingly, defendant's claim that there was insufficient evidence to support the jury's verdict is without merit.

Next, defendant contends that the trial court improperly admitted evidence at trial. We disagree. The decision whether to admit evidence is left to the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

Defendant first complains that it was improper to introduce evidence regarding his use of an alias. It is inappropriate for a prosecutor to inquire about a defendant's use of an alias on some past, unspecified occasion. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). In the present case, however, defendant's use of an alias at the time of his arrest was relevant to his credibility. *Id.* To the extent that additional references to defendant's use of an alias may have been improper, we conclude that the error was harmless in light of the brief questioning, defendant's denials, and the overwhelming evidence against defendant.

We also reject defendant's contention that letters he wrote while in jail were improperly admitted. The letters suggested that defendant had talked to a witness and suggested collusion between

defendant and his codefendant. The letters were therefore relevant to his credibility. Also, the probative value of the letters was not substantially outweighed by the danger of unfair prejudice. MRE 403. Further, defendant's contention that the trial court misapplied the test for evaluating the admissibility of prior convictions is without merit. Our review of the record indicates that the trial court properly considered the relevant factors set forth in MRE 609(b) and that its decision was not the result of the improper consideration of any other factor.

Next, defendant contends that the trial court abused its discretion in refusing to grant a mistrial. We disagree. A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). Here, the trial court's cautionary instruction to the jury was sufficient to cure any prejudice stemming from the testimony in question. Therefore, this claim is without merit.

Next, defendant contends that instructional error deprived him of a fair trial. We disagree. In light of defendant's failure to object below, we review this issue for manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Manifest injustice occurs when an omitted instruction pertains to a basic and controlling issue in the case. *Torres, supra*.

In this case, our review of the record fails to disclose manifest injustice. Here, not only did defendant fail to request a manslaughter instruction, he expressly objected to such an instruction being given, apparently on the basis of trial strategy. "[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error." *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Next, we agree that the defense of others instruction was inapplicable, given the amount of force shown by the evidence. See CJI2d 7.21. Moreover, such an instruction would have been inconsistent with defendant's proffered alibi defense. Thus, failure to give the instruction did not result in manifest injustice. Finally, the alias instruction was proper because evidence of an attempt to avoid arrest can lead to an inference of guilt. *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982).

Defendant contends that he was deprived of the effective assistance of counsel. We disagree. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

In this case, the testimony at the evidentiary hearing failed to establish that trial counsel's strategy regarding his choice and presentation of alibi witnesses was unsound. This Court will not second-guess counsel's decision. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Further, defendant has failed to show that the failure to call additional witnesses in support of his alibi defense deprived him of a substantial defense that would have affected the trial's outcome. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Therefore, ineffective assistance of counsel has not been established.

Finally, defendant takes issue with his sentence, contending that it is disproportionate and improperly forecloses any possibility of parole. We disagree. Contrary to what defendant argues, he will be eligible for parole in fifteen years pursuant to MCL 791.234(6); MSA 28.2304(6). Further, the trial court's comments at sentencing are not an indication that it would object to parole in the future, thereby preventing parole as asserted by defendant. Considering the seriousness of the offense and defendant's extensive criminal history, defendant's life sentence is not disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

We affirm.

/s/ Henry William Saad

/s/ Richard A. Bandstra