

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE ROBERT MOILANEN,

Defendant-Appellant.

UNPUBLISHED

August 2, 1996

No. 172294

LC No. 93-000063-FH

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

PER CURIAM.

Following a jury trial, 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 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment for the felony-firearm conviction, to be followed by a term of mandatory life imprisonment without parole for the murder conviction. Defendant appeals as of right. We affirm.

Defendant was convicted of shooting his wife with a rifle under circumstances in which it would appear that she was the victim of a hunting accident. Defendant first argues the trial court erred by ruling that his confession to the shooting was admissible. We disagree. If an accused validly waives his Fifth Amendment rights, the police may continue questioning him until and unless he clearly requests the assistance of an attorney. *Davis v United States*, 512 US ____; 114 S Ct 2350; 129 L Ed 2d 362, 372-3 (1994); *People v Granderson*, 212 Mich App 673, 677; 538 NW2d 471 (1995). Prior to questioning, defendant was presented with a written waiver form and polygraph waiver form. He was also informed of his *Miranda* rights. (*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 [1966]). Defendant denied involvement in the crime and agreed to a polygraph examination as a means of lending credibility to his exculpatory claims. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995). When confronted by Lieutenant Allen that his statements appeared untruthful, defendant opted to confess, despite full knowledge of his constitutional right to speak with an attorney. *Id.* While defendant did state at one point that he should not say anything more without an attorney

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

present, he later volunteered inculpatory information without further prompting by the police. *Minnick v Mississippi*, 498 US 146; 111 S Ct 486, 490; 112 L Ed 2d 489, 496 (1990); *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982). In fact, the inculpatory statements were made immediately after the interviewing officer had advised defendant that he need not say anything more without an attorney and that the officer would not make him do so. The trial court properly ruled that, under these circumstances, defendant's confession was voluntary.¹

Next, the trial court properly admitted testimony and a videotape regarding an earlier incident in which the victim had been injured when a 80-85 pound chimney block from her house fell upon her head. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). There was no abuse of discretion on the trial court's part in allowing such evidence to be introduced for the purpose of helping to establish defendant's intent to kill the victim. For several reasons, the testimony and the videotape helped to establish that the chimney block incident was not an "accident" as defendant had asserted. First, the evidence established that defendant had told witnesses different versions of what had occurred; second, the evidence established that the block could not have fallen upon the victim in the manner described by defendant. Given the centrality of the issue of defendant's intent to kill his wife, evidence concerning the falling chimney block was relevant to the factfinder's considerations. Nor, in light of the court's limiting instruction concerning the chimney block evidence, was the probative value of this evidence outweighed by any resulting prejudice to defendant. *Id.*

Defendant next argues that evidence of his and the victim's financial position, as well as his receipt of life insurance proceeds from her death, was improperly admitted. We disagree. Because defendant stated in his confession that the shooting was not deliberate, evidence of motive was highly relevant and material. *People v Williams*, 143 Mich App 574, 585; 374 NW2d 158 (1985). The evidence demonstrated that the victim and defendant were experiencing financial problems prior to her death; when this evidence was linked with the victim's threats to leave defendant and with the insurance money that he would receive upon her "accidental" death, it demonstrated a strong motive for the killing. The evidence was not offered for the improper purpose of attempting to demonstrate that defendant was thereby a "bad" person. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). Accordingly, there was no abuse of discretion in admitting evidence of defendant's financial condition as well as evidence that he received the proceeds of the victim's life insurance policies.

Defendant next claims that the prosecutor's witness, Earl Applekamp, was erroneously allowed to give an expert ballistics opinion. We disagree. Applekamp, a licensed surveyor, was properly qualified as an expert in determining distances between objects. MRE 702; *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995). His limited testimony about the calculation of angles and distances between objects, specifically relating to the victim's body and a tree from which the bullet that killed her allegedly ricocheted, was consistent with that for which he was qualified. He did not testify as to information about which only a ballistics expert could testify, e.g. velocity or grain of bullets, but only about matters of location.

Defendant's next challenges the trial court's refusal to restate the prosecutor's theory of the case in its instructions to the jury. This contention is equally without merit. MCR 2.516(A)(2). A review of the court's summation indicates that it was as concise as reasonably possible given the facts and circumstances surrounding the murder of the victim. The theory was neither overly lengthy nor unduly argumentative.

Defendant also contends the trial court abused its discretion by refusing to instruct the jury as requested. A review of the instructions in their entirety indicates that the instructions requested by defendant were adequately addressed within those given by the court. The jury was properly instructed on the issue of premeditation as well as on the fact that defendant claimed to have been in another place at the time of the crime. Accordingly, defendant's request for the disputed instructions was properly denied. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Defendant also challenges the "order of deliberation" instruction given by the trial court. A jury instruction is erroneous if it, or the way it was given, convey the impression that there must be acquittal on one charge before consideration of another. *People v Mays*, 407 Mich 619, 623; 288 NW2d 207 (1980); See also *People v West*, 408 Mich 332; 291 NW2d 48 (1980). However, the disputed instruction follows the language set forth in CJI2d 3.11 and is basically the language approved by our Supreme Court in *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Reversal is therefore not required on this issue.

Defendant's claim that he was denied the effective assistance of counsel is also without merit. His several claims are unsupported by the record, thereby precluding appellate review. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant fails to present any facts on appeal indicating the potential testimony of other absent witnesses, such as the psychological testimony of Dr. Moore. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Further, the testimony of defendant's "alibi" witnesses was effectively presented through defense counsel's cross-examination of police officers; the witnesses did not provide an alibi for defendant during the precise time period in which the prosecution asserted the murder occurred. Defendant failed to raise these issues at trial or through a motion for a *Ginther* hearing. He is therefore not entitled to a remand for an evidentiary hearing on this issue. *Id.*

Finally, defendant claims certain comments by the prosecutor constituted misconduct, some of which resulted in an improper shifting of the burden of proof. Although this issue is not preserved for appeal, we have nevertheless reviewed the record and find no such misconduct. The prosecutor did not improperly shift the burden of proof upon defendant by referring to the absent alibi witnesses since defendant himself had raised the issue of potential alibi witnesses; similarly, the prosecutor did not seek to call defense counsel's veracity into question but attempted only to emphasize that certain evidence highlighted by defense counsel should not distract the jury from the consideration of other relevant evidence. No miscarriage of justice would result from a failure of this Court to address the issue of alleged prosecutorial misconduct. *People v Stanaway*, 446, Mich 643, 687; 521 NW2d 557 (1994); *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995).

Affirmed.

/s/ Harold Hood

/s/ Stephen J. Markman

/s/ Alton T. Davis

¹ Admission of the confession also did not violate the corpus delecti rule. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995); *People v Cotton*, 191 Mich App 377, 394; 478 NW2d 681 (1991). There was sufficient evidence that a crime had been committed here independent of defendant's confession.