

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHARON SUE PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 196892

Van Buren Circuit Court

LC No. 95-009579 FC

Before: MacKenzie, P.J., and White and Smolenski, JJ.

PER CURIAM.

This case arises out of the July 6, 1995 shooting death of defendant's ex-husband, Robert James Phillips. Defendant admitted that she shot the victim in the back of the head at his house, but maintained that the shooting was accidental. The prosecution's theory was that defendant robbed and murdered the victim. A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial judge sentenced defendant to life imprisonment for the first-degree premeditated murder conviction and two years' imprisonment for the felony-firearm conviction; he vacated the felony murder conviction. Defendant appeals as of right. We affirm.

Defendant contends that the trial court abused its discretion in refusing to grant a mistrial based on the testimony of defendant's sister, Tonya Murphy, after Murphy repeatedly volunteered that she had taken a polygraph examination. The trial court's grant or denial of a mistrial will not be reversed on appeal absent an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). An unresponsive, volunteered answer to a proper question is not cause for granting a mistrial. *Id.*, *Haywood, supra*, p 228. This is especially true where the defendant has rejected the opportunity to have the jury charged with a cautionary instruction. *Lumsden, supra*, p 299.

Generally, it is the results of a polygraph that are inadmissible; the mere mention of a polygraph by a witness is not a ground for mistrial. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989). Thus, reference to polygraph examinations need not always constitute error requiring reversal. *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981); *People v Kiczenski*, 118 Mich App 341, 346-337; 324 NW2d 614 (1982). A number of factors should be considered to determine whether reversal is mandated: (1) whether the defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *Rocha, supra*, p 9.

Reversal is not warranted in this case. Murphy was essentially a hostile witness, and her remarks clearly fall into the category of unresponsive answers. Although Murphy made repeated references to a polygraph test, defendant did not seek a cautionary instruction and the results of the test were never made known. Taken in context, it appears that Murphy was attempting to bolster the credibility of her own testimony that the shooting was accidental by suggesting that she willingly took and "passed" a polygraph test. Furthermore, defendant has failed to demonstrate how Murphy's testimony prejudiced defendant. Defendant states that the word "polygraph" is prejudicial. However, the mere mention of the word "polygraph" is not a ground for a mistrial. *People v Paffhousen*, 20 Mich App 346, 351; 174 NW2d 69 (1969). Defendant also claims that the introduction of the polygraph issue allowed the prosecution to demonstrate to the jury that Murphy was an unreliable witness. However, the jury could just as easily infer from Murphy's willingness to talk about the polygraph that it showed her to be truthful. The trial court did not abuse its discretion in refusing to grant a mistrial.

Defendant next contends that the trial court should have granted defendant's motion for directed verdict on both the premeditated murder and felony murder counts. When reviewing the denial of a motion for directed verdict, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of first-degree premeditated murder are: (1) the defendant intentionally killed the victim, and (2) the act of killing was deliberate and premeditated. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). Proof of motive is material in a murder prosecution when a defendant claims accident, but motive is not an essential element of the crime. See *People v Williams*, 143 Mich App 574, 585; 374 NW2d 158 (1985).

In this case, while defendant claimed that she tripped or stumbled as she entered the victim's home with her shotgun, causing the gun to discharge, there was blood spatter evidence indicating that the fatal shot was not fired from below and ballistics evidence that it was virtually impossible for the gun to accidentally discharge. There was evidence that although defendant normally kept her gun unloaded, the gun was loaded when she went into the victim's house. Additional shells were found in defendant's car. Defendant's car was packed with luggage, the shade on the sliding door near the victim's body had been closed after the shooting, the victim's pickup truck had been hidden, and defendant had the keys to the vehicle after the shooting. There was evidence that the victim habitually carried over \$1,000

in cash; no money was found in the house after the shooting. Defendant needed money before the shooting and was in possession of money afterward. This evidence, viewed in a light most favorable to the prosecution, was sufficient for the jury to conclude that defendant planned to kill the victim, take his money, make it look like he was not home, and leave the area before his body was discovered. The trial court did not err in refusing to grant a directed verdict on the premeditated murder charge.

The elements of felony-murder are: (1) the killing of another human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies, including robbery, enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). It is not necessary that the murder be contemporaneous with the enumerated felony. *People v Kelly*, ___ Mich App ___; ___ NW2d ___ (Docket No. 199995, issued 9/25/98), slip op p 7. The statute requires only that the defendant intended to commit the underlying felony at the time the homicide occurred. *Id.*

Viewed in a light most favorable to the prosecution, the evidence showed that defendant had previously discussed with her boyfriend robbing and doing something to the victim, that she was broke at the time of the shooting, that she was desperate enough for money to threaten to harm another individual if he did not give her \$500, and that after the killing she was in possession of money, the source of which she could not account. There was evidence that the victim kept substantial amounts of cash in his house. He had been seen carrying many bills the day before the shooting and had not made a bank deposit in the interim. There was no money in the house after the shooting. From this evidence, a reasonable jury could conclude that defendant intended to steal the victim's money before or at the time of the killing. Again, the trial court did not err in refusing to grant a directed verdict.

Defendant next contends that the trial court abused its discretion in allowing the prosecutor to make use of a model of the crime scene to assist several technical or forensic witnesses to explain their testimony. We find no abuse of the trial court's discretion. The three-dimensional model aided the witnesses in explaining the direction, angle, and range of the fatal shot in relation to the victim's body and the door where defendant claimed to have tripped in a way better than photographs could depict. See *People v Schmitz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 200485, issued 9/11/98), slip op p 7. It also aided witness Robert Birr in explaining how he determined from the blood spatter evidence that the victim was standing when he was shot. These factors were highly relevant since they went to the issue of whether the shot was fired at the door and whether the shot took the upward trajectory one would expect as the result of tripping with the gun. The trial court did not abuse its discretion.

Finally, defendant argues that she was denied effective assistance of counsel because her attorney failed to move for a *Walker* hearing [*People v Walker (On Reh)*, 374 Mich 331; 132 NW2d 87 (1965)] to suppress four statements defendant gave to the police. We disagree. Defendant does not claim, and there is nothing in the record suggesting, that any of defendant's statements were made involuntarily. Given the absence of record evidence to support the need for a *Walker* hearing, it cannot be said that counsel was deficient. See *People v Harris*, 201 Mich App 147, 153-154; 505 NW2d 889 (1993). See also *People v Wise*, 134 Mich App 82, 96-97; 351 NW2d 255 (1984).

Nor does the record suggest that the statements could have been suppressed on any other ground. Defendant argues that the statements were damaging because they contained inconsistencies. Merely because the statements were damaging, however, does not make them inadmissible. See *People v Siler*, 171 Mich App 246, 253; 429 NW2d 865 (1988). The record does not indicate that it was unfairly prejudicial to play the videotapes, and it appears that any motion to exclude them would have been denied. Because counsel need not make a futile motion, *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991), the failure to seek suppression did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Helene N. White

/s/ Michael R. Smolenski