STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 1999
v	No. 202547 Saginaw Circuit Court
CHRISTOPHER BRIAN MITCHELL, Defendant-Appellant.	LC No. 96-011932 FC

Before: Doctoroff, P.J., and McDonald and Wilder, JJ.

PER CURIAM.

Defendant was charged with first-degree murder under alternate theories, premeditated murder and felony 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). Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and felony-firearm. The trial court sentenced defendant to life imprisonment without parole for the felony murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues the jury selection method used in this case violated MCR 2.511(F). The trial court erred when it seated and examined a panel of potential jurors greater in size to the jury that would hear the case. *People v Miller*, 411 Mich 321, 325-326; 307 NW2d 335 (1981); *People v Colon*, 233 Mich App 295, 303; 591 NW2d 692 (1998). However, reversal is not required on this basis because defendant failed to object at trial. *Id*. at 326; *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987); *People v Lawless*, 136 Mich App 628; 357 NW2d 724 (1984).

Moreover, defendant's apparent claim that counsel's failure to object to the jury selection method amounted to ineffective assistance of counsel is without merit. Because there was no evidentiary hearing held on this issue in the trial court, appellate review is permitted only to the extent allowed by the lower court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). In order to succeed on his claim, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant has

failed to allege any prejudice from the jury selection method used in this case. There are no allegations regarding any specific juror and no indication that defendant was not satisfied with the jury in this case. There is no reasonable probability that if counsel had objected to the jury selection method the result of the trial would have been different. Defendant has failed to establish his ineffective assistance claim.

Next, defendant challenges the admission of two photographs of the victim, one that shows the shotgun wound to the back right shoulder, and one that shows the shotgun wound to the head. We have viewed the challenged photographs and find the trial court did not abuse its discretion in admitting them. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). Gruesomeness alone need not cause exclusion of photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995). Moreover, the mere fact that defendant does not contest the nature of the fatal wounds or the physical circumstances of the shooting does not render otherwise admissible photographs inadmissible. *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998).

Defendant next argues the jury saw a videotape of a statement defendant made to police that contained improper references to two criminal cases pending against defendant in Genesee County. Defendant's argument is without merit. It appears the jury never heard the specific references made during the interview with defendant, which defendant challenges on appeal. After the videotape was played, the prosecutor stated on the record, outside of the presence of the jury, that when the tape was played to the jury, Detective Wellman muted the tape when specific references were made. Moreover, the copy of the videotape that was admitted as an exhibit was edited to delete the references. In any event, if the jury in fact heard some general references, the trial court's cautionary instruction on the subject cured any possible prejudice.

Next, defendant claims he was deprived of the effective assistance of counsel. Although defendant's argument on this issue is not specific, we conclude he is claiming that counsel should have moved for a mistrial because the jury heard references to cases pending against defendant in Genessee County. A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial. *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996). As we have already discussed, the jury apparently did not actually hear the references, and the trial court gave an adequate cautionary instruction. Accordingly, a mistrial would not have been justified, and counsel was not obligated to make a motion that would have been unsuccessful. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994). Defendant's claim of ineffective assistance is without merit.

Defendant next claims the trial court erred in admitting a letter defendant wrote to his friend, Matt Forbes, from jail. We find the trial court did not abuse its discretion in admitting the letter. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). The letter was relevant under MRE 401 because defendant's statements in the letter tended to make it more probable that he committed the shooting after premeditation and deliberation, see *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995), and tended to make it less probable that Anna Lanford was involved in the crime. Both of these facts were in issue at trial. Moreover, while the letter certainly was damaging, the prejudice from the letter was not unfair, but instead resulted from its high probative value. *People v*

Fisher, 449 Mich 441, 451-452; 537 NW2d 577 (1995). Accordingly, exclusion was not required under MRE 403.

Defendant also argues the admission of the letter somehow shifted the burden of proof to him. This argument is without merit. The letter did not in any way shift the burden of proof to defendant, it simply was a strong tool for the prosecution to use in meeting its burden.

Next, defendant argues that the statements he made to Trooper Barbara Bebout on an elevator after his arraignment should have been suppressed because they were taken in violation of *Miranda*.[1] This issue is not properly preserved for this Court's review because defendant did not object to the admission of this statement at trial. Although there is an exception to the preservation requirement for important constitutional questions, this Court has explained that *Miranda* issues do not fall under this exception because the rule of *Miranda* is only a procedural safeguard to protect constitutional rights. *People v Todd*, 186 Mich App 625, 628; 465 NW2d 380 (1990). In any event, defendant's argument is without merit because his statements were not the product of interrogation. Defendant initiated a conversation with Trooper Bebout. Her responses to defendant were not words that are reasonably likely to elicit an incriminating response. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

Next, defendant argues the trial court erroneously denied his motion for a directed verdict on the first-degree murder charge.[2] Defendant claims the prosecution did not introduce any evidence that the murder was committed with premeditation and deliberation. Defendant further argues that erroneously allowing the jury to consider the first-degree murder charge requires reversal because of the increased risk of a compromise verdict. We disagree.

Anna Lanford testified that defendant actually discussed killing her parents prior to the shooting of the victim. Moreover, in light of the evidence regarding the nature of the weapon and the order the wounds were inflicted, the jury could have concluded that the time between the first, nonfatal shot and the second, fatal shot was sufficient time for defendant to take a second look at his actions. This inference is further supported by defendant's actions after the crime of hiding the spent shotgun shells and the money obtained during the crime at the Burt Road residence. *Anderson, supra* at 537. Viewing the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution, we find there was ample evidence from which a rational trier of fact could find that the element of premeditation and deliberation was proven beyond a reasonable doubt. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). For these same reasons, defendant's argument that the trial court erroneously instructed the jury on first-degree premeditated murder is also without merit.[3]

Finally, defendant argues the trial court erred when it denied his motion for a directed verdict on the felony murder charge. Defendant claims the prosecution did not prove beyond a reasonable doubt that the homicide was committed during the perpetration of a larceny because it is just as consistent with the evidence that defendant stole the money as an "afterthought" as it is with the evidence that robbery was defendant's primary motive. Defendant also argues that convicting him of first-degree murder because he stole $41.00 violates his due process rights. We disagree.

In order to constitute felony-murder, it is not necessary that the murder be contemporaneous with the enumerated felony. The statute only requires that the defendant intended to commit the underlying felony at the time the homicide occurred. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). However, the felony-murder doctrine does not apply if the intent to steal the victim's property was not formed until after the homicide. *Id.*

Defendant took the victim's wallet and some change from a mug. Anna Lanford testified that before the shooting, defendant described a plan in which they would shoot her parents, steal their car, and then take money from their bank accounts. Moreover, defendant told police that he went over to the Lanfords' in order to rob the victim. Although there was evidence, namely police testimony, suggesting that robbery may not have been the only motive for the crime, considering the evidence in a light most favorable to the prosecution, a rational jury could find beyond a reasonable doubt that defendant intended to steal property from the victim at the time of the shooting. Accordingly, the trial court properly denied defendant's motion for a directed verdict. *McKenzie, supra* at 428.

Defendant's argument that larceny of $41.00 should be insufficient to sustain a conviction of first-degree felony murder is without merit. The felony murder statute clearly indicates that "larceny of any kind" is an enumerated crime, MCL 750.316(b); MSA 28.548, and this Court has held that even misdemeanor larcenies are sufficient. *People v Malach*, 202 Mich App 266, 269; 507 NW2d 834 (1993); *People v Hawkins*, 114 Mich App 714, 717; 319 NW2d 644 (1982).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Gary R. McDonald
/s/ Kurtis T. Wilder

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] In his brief, defendant argues the trial court abused its discretion in allowing Sergeant Gary Wellman of the Michigan State Police to testify as an expert in the field of investigations of robberies, larcenies, and murders. However, at oral argument, defendant withdrew this argument from this Court's consideration. Accordingly, we do not consider this issue.

[3] Moreover, we note that defendant relies on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975) in support of his argument that his conviction should be reversed because the trial court improperly instructed the jury on first-degree premeditated murder. The Michigan Supreme Court recently overruled *Vail* in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998).