

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE BURT WAGLE,

Defendant-Appellant.

UNPUBLISHED

June 6, 2000

No. 217299

Berrien Circuit Court

LC No. 98-402826-FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(c); MSA 28.548(3), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6). He was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and ten to twenty years for the felon in possession of a firearm conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

First, defendant argues that the trial court abused its discretion in admitting two photographs depicting the body of the victim. The decision whether to admit or exclude photographs is within the sole discretion of the trial court, even when the defendant is willing to stipulate to the facts depicted in the photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995); *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972). Here, the photographs in question were offered as corroborative evidence, see *People v Delaney*, 28 Mich App 21, 23; 184 NW2d 208 (1970), and the record indicates that they were selected specifically because they did not depict gruesome details. Their probative value was not substantially outweighed by the danger of unfair prejudice. *Mills, supra* at 78. Thus, the trial court did not abuse its discretion in admitting the two photographs into evidence.

Next, defendant contends that the admission of other bad-acts evidence denied him a fair trial. Defendant, however, has waived appellate review of this issue because he ultimately agreed to the trial court's curative instruction. In response to a defense objection, the jury was excused after the prosecutor asked a witness whether she had filed charges against defendant for domestic violence,

illegal entry, and malicious destruction of property. Following a discussion, the parties agreed that the trial court would inform the jury that the witness had lied to the police on a prior occasion and that the jury should disregard any reference to the incident referred to earlier. Because defendant agreed to the curative instruction, he cannot now assign error on appeal. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Further, we are satisfied from the record that any alleged error did not affect the substantial rights of defendant. *People v Grant*, 445 Mich 535, 552; 520 NW2d 123 (1994).

Third, defendant argues that counsel was ineffective for not requesting jury instructions on the cognate lesser included offenses of manslaughter and involuntary manslaughter. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637 (1996); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Our review of the record convinces us that the evidence did not support a jury instruction for either voluntary or involuntary manslaughter, thus making a request for such an instruction unnecessary. *People v Clark*, 453 Mich 572, 578; 556 NW2d 820 (1996); *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Specifically, the evidence did not support a finding that defendant killed in the heat of passion or acted because of adequate provocation. Nor was there evidence that the shooting resulted from an unintentional negligent act without malice. Furthermore, even if counsel was deficient for failing to request lesser offense instructions on manslaughter, the jury was instructed on second-degree murder and rejected that offense, thereby reflecting "an unwillingness to convict of a lesser included offense such as manslaughter." *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). Thus, it is clear that defendant was not prejudiced by any alleged deficiency by counsel not requesting the lesser offense instructions.

Next, defendant contends that the evidence was insufficient to sustain a conviction for first-degree murder because there was no eyewitness or scientific evidence to prove beyond a reasonable doubt that he shot the victim with premeditation and deliberation. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

The evidence indicated that defendant drove past the victim, who was walking along the road. Defendant subsequently stopped his car in a parking lot, changed places with the passenger, and then had the driver drive back towards the victim. The car slowed as it approached the victim and two eye witnesses testified that defendant was in the passenger seat when the fatal shots were fired from the passenger window of the automobile that defendant was in. One eyewitness specifically identified defendant as the shooter and testified that defendant's arm reached outside the passenger's window before defendant fired the shots. Another witness testified that he heard defendant say, "I shot him in

the head,” and, when he asked defendant why he did it, defendant blamed alcohol and also stated that some money he owed for drugs would be reduced. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant shot the victim with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537-538; 531 NW2d 780 (1995). It was for the jury to determine the weight of the evidence and the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

Lastly, defendant argues that his Fifth Amendment right to remain silent was violated at trial. A police officer testified that, after the police had “put the word out” that the police wanted to speak to defendant and some others, defendant went to the station and asked what the police wanted. Defendant was told that they wanted to talk to him about what happened. Defendant responded that he was seeking an attorney and did not want to give a statement. No interrogation took place and defendant freely left the police station as the police continued their investigation. In this context, the testimony concerning defendant’s silence before any custodial interrogation and before *Miranda*¹ warnings were given did not violate defendant’s constitutional right to remain silent. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996); *Anderson*, *supra* at 532.

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck

¹ *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966).