

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH J. MUIR,

Defendant-Appellant.

UNPUBLISHED

September 24, 2002

No. 231509

Kalamazoo Circuit Court

LC No. 00-000464-FC

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant Kenneth J. Muir appeals as of right from his convictions of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, larceny in a building, MCL 750.360, and unlawful driving away a motor vehicle (UDAA), MCL 750.413, entered after a bench trial. He was sentenced to life in prison without parole for the murder conviction, with concurrent sentences of thirty-eight to ninety months for the felon in possession and UDAA convictions and 17 to 72 months for the larceny conviction. He was also sentenced to a two-year consecutive sentence for his felony-firearm conviction. We affirm.

This case involves the shooting death of Louise Mensch, defendant's grandmother. According to the prosecution's theory of the case, defendant deliberately shot the decedent in the head while she sat on the sofa sewing on October 24, 1999. He then ransacked her bedroom, took her jewelry and her purse and left after taking her automobile.

Defendant argues on appeal that he was denied a fair trial on the ground that the prosecution impermissibly attempted to introduce other act evidence in violation of MRE 404b. However, we note that the trial court sustained defendant's objection to the introduction of the evidence and stated that it would not consider this evidence. Thus, even were we to assume that this evidence was properly excludable under MRE 404b, defendant is not entitled to relief. When other acts evidence has been improperly admitted at trial, the defendant must show that it is more probable than not that the error was outcome determinative in order to justify relief. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Here, where the evidence was not, in fact, considered by the trial court, defendant cannot show prejudice, especially in light of the other evidence presented by the prosecution.

We note that defendant confessed to the killing in a statement given to police. He specifically admitted that he intentionally shot the decedent in the head with a .22 caliber rifle, stole her jewelry and purse and fled in her automobile. In addition to this statement, the prosecution presented evidence linking the jewelry and decedent's other property to defendant, ballistic and forensic evidence supporting defendant's statements of the manner of the shooting, evidence of defendant's fingerprint on a .22 caliber rifle, evidence linking defendant to the decedent's automobile after the shooting and evidence of defendant's subsequent flight to Nebraska.

In addition, the fact that defendant was tried at a bench trial rather than by jury undermines his argument that he was denied a fair trial by the prosecution's attempt to admit this other act evidence. "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). The trial court's comments during trial and in discussing his findings of fact support this premise and refute defendant's claim that the trial court improperly relied on this excluded evidence.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly