

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC FRENCH,

Defendant-Appellant.

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UNPUBLISHED

August 30, 1996

No. 176703

LC No. 93-011714

Before: Griffin, P.J., and Bandstra and M. Warshawsky,\* JJ.

PER CURIAM.

Defendant appeals by right his convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MSA 750.227b; MSA 28.424(2). Defendant was sentenced to forty to eighty years' imprisonment on the second-degree murder conviction and two years on the felony-firearm conviction. We remand.

Defendant first alleges that the trial court erred when it denied his motion for directed verdict on the first-degree murder charge because there was no evidence of premeditation and deliberation. We disagree. When reviewing a trial court's ruling on a motion for directed verdict, this Court must consider the evidence presented up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of murder was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Defendant's conduct in this instance, which included arguing with the decedent's family, waving a gun at them, and shooting the decedent twice, once in the head and once in the chest, evidenced that the killing was done with premeditation and deliberation. *People v Schollaert*, 194 Mich App 158, 170-171; 486 NW2d 312 (1992); *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). Therefore, the trial court did not err in denying defendant's motion for a directed verdict on the first-degree murder charge as there was sufficient evidence to warrant submitting this charge to the jury. *Jolly, supra* at

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

Next, defendant argues that the trial court abused its discretion when it denied his motion for a continuance in order to secure a psychiatric examination by an independent examiner because the denial violated his constitutional right to present a defense. We agree. The grant or denial of a continuance is reviewed for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Upon receiving an unfavorable report from the Detroit Recorder's Court Psychiatric Clinic, defense counsel immediately filed a request for an independent examination. The trial court granted defense counsel's request, but required that the new report be filed within five days. It is this Court's opinion that the requirements that defendant be examined and a report filed in five days were unreasonable. Throughout the course of the proceedings, there was evidence that defense counsel was promptly filing all the necessary papers and motions, including the request for an independent examination. Furthermore, counsel had no control over when the Recorder's Court psychiatrist would file his report. To require a report from the independent psychiatrist to be filed in five days was unjust. There was evidence that defendant was emotionally unstable and had been prescribed drugs in the past and as such, an insanity defense may have altered the course of trial. Defendant here asserted a constitutional right, *People v Pullins*, 145 Mich App 414, 417; 378 NW2d 502 (1985), had a legitimate reason for asserting the right, had not been negligent, and had not requested previous adjournments. *Lawton*, *supra* at 348. The trial court abused its discretion when it denied defendant's request for a continuance.

The prosecutor argues that the trial court's decision to deny the continuance is justifiable because defendant failed to follow the trial court's usual practice by failing to request an independent psychiatric examination at the same time a request for an examination by the Detroit Recorder's Court Psychiatric Clinic was made. We disagree. It is unreasonable to require a defendant to request and undergo two psychiatric examinations that might result in duplicative results. Instead, a reasonable approach for protecting the constitutional rights at issue here would be to allow a reasonable time after a defendant receives an unfavorable report from the Recorder's Court Clinic to secure an independent examination and report. Defendant requested an independent examination immediately upon receipt of the unfavorable report from the Recorder's Court Clinic, and the trial court's failure to grant a continuance to allow the independent examination to occur before trial was an abuse of discretion.

Defendant also argues that he was denied his constitutional right to effective assistance of counsel when his attorney: (1) failed to secure an independent psychiatric examination prior to trial; and (2) consented to keeping a juror who had been caught sleeping by the trial court. We disagree. Because an evidentiary hearing was not held, review of this issue is limited to the existing record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Although in hindsight counsel might have made prior arrangements for defendant to see an independent examiner, his failure to make such arrangements does not render his representation ineffective. See *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). As well, counsel's failure to request that the sleeping juror be removed did not render his representation of defendant ineffective, as decisions regarding whether to strike jurors during voir dire are matters of trial strategy

and should not be the basis for a reversal on grounds of

ineffective assistance. See *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986).

Defendant also contends that the prosecutor improperly: (1) misstated the evidence with regard to the actual shooting; (2) inferred that defendant's alias was indicative of his credibility; (3) inflamed the passions of the jurors by analogizing the facts of the case to the Vietnam War; and, (4) appealed to the jury's civic duty by mentioning the number of public figures who had been assassinated. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). Contrary to defendant's assertion that the prosecutor twisted the facts in order to show the premeditation and deliberation necessary to support the charges against defendant, the prosecutor was merely relating the facts adduced at trial to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Although the prosecutor erred in stating that defendant first shot the decedent in the chest and then the head, defendant failed to object to this comment, and any error could have been corrected by a timely instruction; therefore, reversal is not warranted. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). When mentioning that defendant was also known by an alias, the prosecutor was properly inferring that defendant was not a credible witness. See *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). When making a reference to the Vietnam War, the prosecutor was not asking the jury to sympathize with the victim but was merely making a colorful analogy and, while such a form of argument is frowned upon, *People v Kent*, 157 Mich App 780, 794; 404 NW2d 668 (1987), the prosecutor need not make his arguments in the blandest of terms, *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Finally, although certain aspects of the prosecutor's reference to various famous assassinations bore a close resemblance to a civic duty argument, in light of the overwhelming evidence against defendant, the comments did not lead to prejudicial error. *People v Eaton*, 114 Mich App 330, 335; 319 NW2d 344 (1982). Furthermore, the trial court instructed the jury that the attorney's comments and arguments were not evidence and could not be used as a basis for convicting defendant, and this curative instruction was sufficient to overcome any prejudice defendant may have inured as a result of the prosecutor's arguments. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Defendant further alleges that he was denied his constitutional right to a fair trial because of several instances of judicial misconduct. We disagree. A trial court has wide discretion and power in the conduct of a trial. A trial court's conduct pierces the veil of judicial impartiality only if it unduly influenced the jury and deprived defendant of a fair trial. *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989); *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988); *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986). The trial court here was properly admonishing defendant for disobeying the court's orders and properly asking him to comport himself in a manner suitable for the courtroom. There was no excessive interference in the examination of witnesses, repeated rebukes, and disparaging remarks directed at defendant's counsel or marked impatience in the presence of the jury to evidence that the trial court's conduct pierced the veil of judicial impartiality. Compare *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992).

As well, defendant argues that the judge's comments during sentencing evidenced that she was not impartial. Because defendant did not object to the judge's comments or conduct during sentencing, this Court need only review this issue to prevent manifest injustice. *Sharbnow, supra* at 99. Having reviewed the comments in context, no manifest injustice will result from this Court's failure to review this issue. Furthermore, sentencing is the time for comments against felonious, antisocial behavior and the language of punishment need not be tepid. *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992).

Finally, defendant contends that his sentence of forty to eighty years' imprisonment for the second-degree murder conviction was disproportionate. When reviewing a sentence for proportionality, provided permissible factors are considered, this Court's review is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the offense and the conduct of the offender. *Id.* The sentence here was appropriate and proportionate. The guidelines do not take into account the fact that a restraining order had been issued to prevent defendant from seeing the decedent and that defendant defied that order, went to her house, and killed her. *People v Hudson*, 187 Mich App 31, 34; 466 NW2d 313 (1991). As well, the guidelines do not reflect the tragedy that has occurred in this family or the fact that they stood helplessly by while defendant killed their loved one. *Id.* The trial court properly made an upward departure from the guidelines range, and the sentence imposed was proportionate to both the offense and the offender. *Milbourn, supra*.

We remand this matter to the trial court for entry of an order, within 21 days of the date of this opinion, appointing an independent psychiatric expert to evaluate and render a report regarding defendant's criminal responsibility. Defendant shall further be allowed to bring a motion before the trial court for a new trial if, upon reviewing the report of the independent psychiatric examiner, he concludes that the outcome of his trial would have been different if the examiner's testimony had been presented to the factfinder. That motion shall be made within 21 days of the issuance of the independent examiner's report. The trial court shall decide the motion within 42 days thereafter, allowing the parties an opportunity to brief the issue under a schedule the trial court may provide. We retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Meyer Warshawsky