

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRINITY DAVIS,

Defendant-Appellant.

UNPUBLISHED

September 17, 1996

No. 170828

L.C.No. 92-011780

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree murder, MCL 750.316; MSA 28.548, three counts of assault with intent to murder, MCL 750.83; MSA 28.278, and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of fifteen to thirty years, and mandatory life imprisonment without parole, and to a consecutive two year term for felony-firearm. We affirm.

There is no merit to defendant's claim that he was denied effective assistance of counsel where trial counsel failed to present or investigate his alibi defense. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the alleged deficiencies were prejudicial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991).

The record in this case does not support defendant's claim. Defendant states in his affidavit that he was convinced to waive his sister's alibi testimony after consultation with counsel. Trial counsel's decision whether to call defendant's sister as a witness, in this case where defendant was identified by three eyewitnesses who had known him for over three years, was a matter of trial strategy. We will not substitute our judgment for that of counsel regarding trial strategy, nor will we assess counsel's

competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Counsel was not ineffective in this case.

The trial court's instruction on "state of mind", which involved a verbatim reading of Criminal Jury Instruction 2d (CJI2d) 16.21, was not improper. Nor was counsel ineffective for failing to object to a proper instruction. The jury was also properly instructed, by a verbatim reading of CJI2d 11.34, on the elements of felony-firearm. Because there was no dispute concerning whether the gun defendant was seen holding was a firearm, an instruction defining "firearm" was not warranted, and counsel was not ineffective for failing to request such an instruction.

The trial court did not err in failing to sua sponte instruct the jury on the lesser included offense of intentionally aiming a firearm without malice and death resulting. The evidence at trial did not support such an instruction. Witnesses testified that defendant, along with several other individuals, came from behind some bushes, clothed in black and wearing hoods. Defendant and the others pulled guns, and began firing shots in the direction of decedent and complainants. There was no evidence from which a jury could infer that the shooting was done without malice. Moreover, any error would have been harmless. The jury had the option of convicting defendant of a lesser offense, second-degree murder, but returned a verdict on first-degree murder. See *People v Beach*, 429 Mich 450, 481, 490-491; 418 NW2d 861 (1988). Defense counsel was not ineffective for failing to request the instruction.

Defendant was not denied a fair trial because of the admission of "irrelevant and extremely prejudicial testimony", and the trial court did not abuse its discretion in denying defendant's motions for a mistrial on this basis. The testimony that defendant was part of a group that "shot up" local houses was harmless in light of the overwhelming evidence that defendant committed these crimes. The police officer's challenged testimony was not deliberately solicited by the prosecutor, was ordered stricken, and any resulting prejudice was cured by the trial court's curative instruction to the jury. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

Affirmed.

/s/ Roman S. Gibbs

/s/ Marilyn Kelly

/s/ Helene N. White