

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS A. WARD,

Defendant-Appellant.

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UNPUBLISHED  
October 18, 1996

No. 184481  
LC No. 94-004779

Before: Reilly, P.J., and Sawyer and W.E. Collette,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without parole on the murder conviction and to two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

The first issue to be decided is whether the trial court committed error requiring reversal when it refused to allow defendant to cross-examine the prosecution's expert witness regarding psychiatric medication which defendant was taking at the time he was evaluated by the expert. The trial court ruled that the information sought was not relevant because there had been no evidence presented to that point as to what that medication was, and the expert did not know what that medication was. A trial court has discretion to admit or exclude evidence on relevancy grounds. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). We find no abuse of discretion in this case.

The second issue to be decided is whether the trial court properly excused the prosecutor's failure to produce an endorsed witness. Under MCL 767.40a; MSA 28.980(1), a prosecutor must within thirty days of trial, provide defendant a list of the witnesses the prosecutor intends to produce. The prosecutor must then exercise due diligence to produce those witnesses. *Wolford, supra*, 189 Mich App 483-484. However, the statute also provides that a prosecutor may delete witnesses from the witness list "at any time upon leave of the court and for good cause shown." Furthermore, this Court will not reverse a trial court's determination of due diligence unless that decision was clearly

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

erroneous. *Id.* at 484. In the present case, the trial court found that the prosecution exercised due diligence in its efforts to produce the witness after hearing testimony from the police and prosecutor with respect to their efforts to do so. We find that the trial court's decision was not clearly erroneous.

The third issue to be decided is whether the prosecutor made improper arguments regarding facts which were not in evidence during its rebuttal argument. Defendant objected to the allegedly improper comments and, therefore, reversal is required if the comments denied defendant a fair trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). We have examined the prosecutor's remarks in context and find that they did not constitute an argument based on facts which were not in evidence, but rather an argument based on permissible inferences which were based on facts in the record. Therefore, defendant is not entitled to relief on this basis.

The fourth issue on appeal is whether the trial court erred in instructing the jury. Defendant did not object to the allegedly erroneous instruction and, therefore, review is precluded unless manifest injustice would otherwise result. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). The trial court's allegedly erroneous instruction is virtually identical to CJ2d 16.21. Furthermore, it is not error for the trial court to instruct the jury that malice could be inferred from the use of a dangerous weapon. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 855 (1980). Therefore, the trial court's instruction did not shift the burden of proof to defendant on any issue.

The final issue on appeal is whether the trial court committed error requiring reversal when it denied defendant's request that trial be adjourned and defendant referred for further treatment so that his expert witness could complete his evaluation of defendant's state of mind at the time of the killing. Defendant is correct that he is entitled to an independent psychiatric evaluation by a clinician of his choice. MCL 768.20a(3); MSA 28.1043(1)(3). However, two weeks prior to the start of trial defendant was aware that his expert did not feel he had enough information on which to reach a conclusion on defendant's sanity. Defendant did not raise this issue until the first day of trial. In these circumstances, a trial court has discretion to deny a defendant's request for an independent psychiatric examination. *People v Smith*, 103 Mich App 209, 210-211; 303 NW2d 9 (1981). Therefore, the trial court also had discretion to deny defendant's request for additional time for his expert to further evaluate defendant.

Affirmed.

/s/ David H. Sawyer  
/s/ William E. Collette

I concur in the result only.

/s/ Maureen Pulte Reilly