

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE C. EVANS,

Defendant-Appellant.

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UNPUBLISHED  
November 1, 1996

No. 172778  
LC No. 93-007683

Before: McDonald, P.J., and Bandstra and C. L. Bosman\*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and sentenced to life in prison without parole. He now appeals of right and we affirm.

This case arises from the beating death of Katie Branham. On appeal, defendant argues that he is entitled to a new trial because his trial counsel was ineffective. To establish a denial of effective assistance of counsel, the defendant must prove that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Barclay*, 208 Mich App 670; 528 NW2d 842 (1995). Because defendant's motion to remand for an evidentiary hearing was denied, this Court's review is limited to errors on the record. *People v Oswald (After Remand)*, 188 Mich App 1; 469 NW2d 306 (1991).

Defendant contends that his trial counsel was ineffective in failing to investigate and present a diminished capacity defense. In making such an argument, defendant uses the terms "diminished capacity" and "voluntary intoxication" interchangeably. The terms are not, however, synonymous. Although both defenses involve a claim that the defendant lacked the capacity to entertain the specific intent necessary for conviction, the cause of the loss of capacity differs depending on which defense is asserted. Michigan Criminal Law and Procedure, (2nd ed), §§ 42.55, 44, pp 160, 167. The defense of intoxication operates where the defendant suffers from an impairment in capacity due to alcohol or drug ingestion. *Id.* at § 42.55, p 163. Mental illness, however, is the triggering mechanism for any

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

claim of diminished capacity. *Id.* Underscoring the distinction between “diminished capacity” and “voluntary intoxication” is the fact that there are separate jury instructions for each offense.

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524; 465 NW2d 569 (1990). To prevail on an ineffective assistance claim, however, defendant must show that he made a good faith effort to avail himself of that right. *Id.* Here, defense counsel indicated he did not learn about defendant’s desire to present a diminished capacity defense until the day before trial commenced. There is nothing in the record suggesting counsel should have been aware of the necessity of raising such a defense prior to that date. Upon realizing his client wished to present the defense of diminished capacity, counsel immediately moved for an adjournment so he could obtain a psychological evaluation. The motion was denied. Under these circumstances, we find defendant has failed to establish that his trial counsel was ineffective.

Defendant’s contention his trial counsel failed to present a sufficient intoxication defense is also without merit. Defense counsel questioned witnesses regarding defendant’s history of alcohol use and his alcohol intake on the weekend Katie was murdered. During closing argument, defense counsel attempted to persuade the jurors defendant was so intoxicated on the night in question he lacked the specific intent required to support a first-degree murder conviction. The jury was properly instructed regarding the voluntary intoxication defense. On these facts, we find counsel’s performance was reasonable.

Next, defendant argues the trial court abused its discretion in admitting photographs of Katie’s body into evidence. Defendant contends the photographs were irrelevant and prejudicial. We disagree. Although the photographs are admittedly disturbing, gruesomeness alone is not grounds for exclusion. *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995). Photographic evidence is admissible if it is substantially necessary or instructive to show material facts of conditions. *People v Faulkner*, 389 Mich 682; 209 NW2d 193 (1973). “If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking crime or accident, even though they may tend to arouse the passion or prejudice of the jurors.” *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994).

Photographic evidence is admissible to establish intent to kill and premeditation. *Mills, supra*. By showing the nature and extent of the injuries, the photographs supported the prosecution’s theory defendant struck Katie repeatedly with the knowledge and intent her death would result. The photographs also bolstered the credibility of the prosecutor’s expert witness and tended to contradict defendant’s theory the injuries were caused by accident. Exclusion was not warranted simply because other evidence was presented showing the post-mortem condition of Katie’s body. The prosecution is under no duty to present its case on alternate proofs. *People v Eddington*, 387 Mich 551; 198 NW2d 297 (1972).

Photographs depicting blood stains in defendant’s house were also properly admitted into evidence. The only foundational requirement for the admission of a photograph is the testimony of an individual, familiar with the scene photographed, that it accurately reflects the scene depicted in the

photograph. *People v Curry*, 175 Mich App 33; 437 NW2d 310 (1989). Here, the photographer testified the photographs accurately reflected the crime scene. Whether the stains were connected to the murder was a question for the jury to decide.

Defendant argues he is entitled to a new trial because the prosecutor commented on his failure to testify during rebuttal argument. Because defendant failed to object to the prosecutor's remark, this issue is not preserved for review, *People v Austin*, 209 Mich App 564; 531 NW2d 811 (1995), and we find no manifest injustice occurred.

Next, defendant contends he was denied a fair trial because the prosecutor read a statement which made reference to the fact that defendant was in jail prior to the commission of the charged offense. Generally, evidence that tends to show the commission of other criminal acts by a defendant is not admissible to prove guilt of the charged offense. *People v Williamson*, 205 Mich App 592; 517 NW2d 846 (1994). Although the prosecutor's reference to incarceration could lead a listener to conclude that defendant committed a prior act of misconduct, we find defendant is not entitled to reversal on this basis. Defense counsel did not move to suppress the statement prior to trial. Moreover, despite the fact he had ample time to object before the prosecutor got to that portion of the statement referring to prior incarceration, defense counsel did nothing. We find it would be improper to reverse defendant's conviction after defense counsel sat idly by and allowed potentially prejudicial testimony to be read to the jury.

Finally, we reject defendant's contention he is entitled to a new trial because the trial court denied the jurors' request to rehear the testimony of three prosecution witnesses. The trial court did not foreclose the possibility of rereading the testimony to the jury. See *Austin, supra*; *People v Robbins*, 132 Mich App 616; 347 NW2d 765 (1984).

Affirmed.

/s/ Gary R. McDonald  
/s/ Richard A. Bandstra  
/s/ Calvin L. Bosman