

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN JOHN GILLENKIRK,

Defendant-Appellant.

UNPUBLISHED

November 26, 1996

No. 183430

LC No. 94-003629

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

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of ten to twenty-three years of imprisonment for the murder and assault convictions, to be served consecutively to the mandatory two year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair and impartial trial due to the prosecutor's pattern of improper questions and numerous improper comments made during closing and rebuttal arguments. Occasionally, defendant objected and his objections were sustained. However, defendant failed to object to nearly all of the prosecutor's alleged misconduct. Therefore, we find that this issue is not preserved for appellate review. *People v Stanaway*, 446 Mich 643, 686-687; 521 NW2d 557 (1994).¹ Indeed, we believe that any prejudice resulting from the prosecutor's behavior could have been cured by the trial court's issuance of cautionary instructions. See *People v Leighty*, 161 Mich App 565, 575-577; 411 NW2d 778 (1987).² We find that no manifest injustice will result from our failure to review defendant's claims of prosecutorial misconduct.

Defendant next argues that he was denied the effective assistance of counsel. Specifically, defendant argues that counsel was ineffective because he did not present qualified medical experts to support his defense theories of diminished capacity and temporary insanity. We disagree. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was

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

deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney whose assistance is guaranteed by the Sixth Amendment to the United States Constitution. Further, defendant must show that any deficiency was prejudicial to his case such that counsel's error may have affected the outcome at trial. *People v Pickens*, 446 Mich 298, 302-303, 312, 314; 521 NW2d 797 (1994)

Defense counsel's decision to call medical witnesses to testify can best be described as trial strategy. See *People v Fisher*, 87 Mich App 350, 358-359; 274 NW2d 788 (1978). Trial counsel's strategy will not be second-guessed unless the defendant was denied a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In addition, the fact that a strategy did not work does not constitute ineffective assistance of counsel. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Upon reviewing the lower court record, we find that defendant's expert, Dr. Miller, adequately supported defendant's theory of temporary insanity. Moreover, defendant has not established that he was prejudiced by counsel's decision to rely on Dr. Miller. Although defendant suggests that the testimony of a medical expert, as opposed to a forensic psychologist, might have helped defendant's case, defendant has presented no evidence that there was a medical expert who was willing to testify in support of defendant's theory. In sum, we conclude that defendant has not established that he was denied a substantial defense or that he was prejudiced due to trial counsel's actions.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ David H. Sawyer
/s/ William E. Collette

¹ With regard to defendant's many allegations of prosecutorial misconduct, counsel only objected to the prosecutor's question about "middle class guys who kind of lose it and go nuts with a gun." The lower court sustained the objection. However, defendant objected on relevance grounds and not on the grounds that the prosecutor was injecting sarcasm, cynicism or unprofessionalism into the proceedings. Thus, as stated above, the allegations of prosecutorial misconduct are not preserved, either because defendant failed to object at all, or because defendant objected on one ground at trial and argued a different ground on appeal. *People v Nantelle*, 215 Mich App 77, 86-87; ___ NW2d ___ (1996).

² We note that the trial court did issue one sua sponte instruction to address the prosecutor's appeal for juror sympathy. We hold that the trial court's instruction cured any prejudice which resulted from the prosecutor's comments about the victim's father. See *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988).