STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES GULLAT,

Defendant-Appellant.

UNPUBLISHED
December 17, 1996

No. 181005
Recorder's Court
LC No. 93-004087

Before: Griffin, P.J., and T.G. Kavanagh* and D.B. Leiber**, JJ.

PER CURIAM.

Defendant, James Gullat, appeals as of right his convictions for first-degree murder, MCL 750.316; MSA 28.548, 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 first-degree murder conviction to be served consecutively to a two-year sentence on the felony-firearm conviction. We affirm.

Defendant first claims that the prosecutor presented insufficient evidence on the premeditation and deliberation elements of first-degree murder. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). First-degree murder consists of the intentional killing of a human being done with premeditation and deliberation. *People v De Lisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). To prove premeditation and deliberation, there must be an interval during which a "second look" may be contemplated. Factors which may be considered by the trier of fact to

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* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.
** Circuit judge, sitting on the Court of Appeals by assignment.

determine if premeditation and deliberation are present include: (1) the previous relationship between the victim and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted. *People v Passeno*, 195 Mich App 91, 100; 489 NW2d 152 (1992). The amount of time necessary for a "second look" may be only seconds or minutes or more depending on the totality of the circumstances. *People v Tilley*, 405 Mich 38, 45-46; 273 NW2d 471 (1979).

In the present case, Robert McClain testified that he saw defendant approach a vehicle, tap on the window with a large pistol, and threaten to "spray everybody in the car." All but one of the occupants fled, while the remaining occupant got out and stood face to face with defendant. The two exchanged words and defendant struck the victim in the face. Defendant then took at least two steps backward and shot the victim twice. After the shooting, defendant kicked the victim in the face and fled the scene. Another witness testified that shortly before the shooting, he saw defendant walking on French Road carrying a gun and that defendant said "I'm tired of it, I'm tired of it." In addition, just before defendant shot the victim, the victim said, "If you're going to kill me, kill me." Taken in the light most favorable to the prosecution, this evidence suggests that defendant had a period of time to contemplate the nature of his actions and did so. In addition, defendant's statement to police included a description of an altercation earlier that day between defendant and the victim. This suggests a motive for the killing. See *People v Gonzales*, 178 Mich App 526, 533-534; 444 NW2d 228 (1989).

Defendant next argues he was denied a fair trial when, during voir dire, the prosecutor told a prospective juror that "the victim's family is here too and they expect some justice." We disagree. It is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). However, in *People v Wise*, 134 Mich App 82, 106; 351 NW2d 255 (1984), this Court found a similar remark to be curable with a limiting instruction. In the present case, the trial court sustained defendant's objection to the prosecutor's remark and reminded the jury that they must find defendant guilty beyond a reasonable doubt. Defendant does not object to the trial court's curative instruction. Therefore, any prejudice could have been and was cured when the trial court sustained defendant's objection.

Next, defendant claims that he was denied the effective assistance of counsel. We disagree. To establish that counsel's assistance was so defective as to require reversal of a conviction, the defendant must establish (1) that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense, i.e., that there is a reasonable probability that absent the error, the factfinder would have had a reasonable doubt respecting guilt. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d (1984).

Defendant has not established that his attorney's performance was deficient. While defense counsel's decision not to put defendant on the stand might be somewhat questionable in light of defense counsel's failure to present any evidence, we note that defendant consented to this strategy on the

record. Furthermore, the record would have provided the prosecutor with ample opportunities for damaging cross-examination had defendant taken the stand. In this context, we find that defendant has failed to overcome the presumption that this decision, and the consequent decision not to present a self-defense argument, might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Nor can defendant establish ineffective assistance based on his claim that he was unable to present an intoxication defense because his attorney "never visited" him in jail. Nothing in the record suggests that this allegation is true. Moreover, defendant did not bring a motion for new trial on this basis, and this Court has already ruled that his claims do not warrant a remand for further fact-finding. Therefore, our review is limited to the already existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987), which does not support defendant's argument.

Finally, defendant argues that the trial court should have suppressed defendant's statement to the police because it was not voluntary. At a pretrial suppression hearing, the trial court concluded that the statement was voluntary. We have examined the entire record and find that the trial court's decision to accept the prosecution witnesses' version of events over that of defendant was not clearly erroneous. *People v Bender*, 208 Mich App 221, 226-227; 527 NW2d 66 (1994). This evidence supports the trial court's ruling that defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). Therefore, the trial court did not err by admitting the statement.

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas Giles Kavanagh
/s/ Dennis B. Leiber