

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ULYSSES AVERHEART,

Defendant-Appellant.

---

UNPUBLISHED

December 27, 1996

No. 166306

Detroit Recorder's Court

LC No. 92-009034

Before: Holbrook, Jr., P.J., and White and A.T. Davis, Jr.,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, first-degree premeditated murder, MCL 750.316; MSA 28.548, and armed robbery, MCL 750.529; MSA 28.797.<sup>1</sup> Following a juvenile dispositional hearing, the trial court sentenced defendant as an adult to life imprisonment on the felony murder conviction. Defendant appeals by right and we affirm.

Defendant first argues that he was denied due process and a fair trial when the trial court unduly emphasized the prosecution's theory of the case during its instructions to the jury. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991); *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989).

Here, read as a whole, the trial court's instructions included all elements of the crimes charged and any defenses or theories supported by the evidence. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The trial court fully and fairly presented the crimes charged to the jury in an understandable manner, repeating the essential elements of these crimes in an attempt to clarify them for

---

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

the jury, but issuing the straightforward instructions on defendant's alibi defense, presumption of innocence, reasonable doubt, and burden of proof only once. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Despite repeating the elements of the crimes charged several times during the initial charge to the jury, the jury still requested a reread of the instructions pertaining to felony-murder and premeditated murder once deliberations began. Thus, defendant was not prejudiced when the trial court repeated the elements of the crimes charged several times. Such repetition did not unduly emphasize the prosecutor's theory of the case, but instead was intended to fully and clearly inform the jury of the elements of the crimes charged. Accordingly, we conclude that the instructions as given fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Wolford, supra* at 481.

Defendant next argues that he was denied effective assistance of counsel because counsel failed to object to two witnesses' comments regarding defendant's past criminal activity and failed to move for a mistrial on the basis of this testimony. We find no merit to this claim. Because defendant did not make a motion for an evidentiary hearing or new trial, this Court's review of this issue is limited to the facts available on the existing record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that any deficiency was prejudicial to his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). Here, one witness' answer, in which he mentioned defendant's criminal behavior, was non-responsive and the other witness' comments regarding the stolen car did not implicate defendant. Accordingly, it is highly unlikely that a motion for a mistrial based on these comments would have been successful and, therefore, counsel's failure to object or make a motion for a mistrial did not render his representation ineffective. See *People v McKeever*, 123 Mich App 533, 539; 332 NW2d 596 (1983).

Defendant next argues that the trial court abused its discretion in denying defendant's motion for a third continuance of the juvenile dispositional hearing in order to secure an additional witness. We find no abuse of discretion. In determining whether a court abused its discretion in denying a criminal defendant's request for a continuance, this Court considers whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Here, even though defendant had a constitutional right to present witnesses in his defense, it appears from the record that counsel was simply unable to secure the presence of the subpoenaed witness, despite repeated attempts. Indeed, defendant had requested and was granted two previous adjournments—extending the hearing from February 9, 1993, to April 23, 1993—in order to obtain the witness' presence in court. *Lawton, supra* at 348. Moreover, upon granting defendant's second adjournment, the trial court expressly stated on the record that this was the "last adjournment" and that if the witness was not in court for the next scheduled hearing date the court would "render [its] decision after hearing your argument." Accordingly, under the circumstances of this case, we find no abuse of discretion by the court in denying defendant's third request for an adjournment.

Finally, defendant argues that the trial court clearly erred in failing to make specific findings on the required criteria following the juvenile dispositional hearing and abused its discretion in sentencing

defendant as an adult to mandatory nonparolable life imprisonment. We disagree. In reviewing a trial court's decision to sentence a juvenile as an adult, this Court must apply a bifurcated standard. *People v Haynes*, 199 Mich App 593, 595; 502 NW2d 758 (1993). First, the trial court's findings of fact are reviewed under the clearly erroneous standard. *People v Miller*, 199 Mich App 609, 612; 503 NW2d 89 (1993); *Haynes, supra* at 595. Findings of fact are clearly erroneous if, after examining the whole record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994). Second, the trial court's ultimate decision to sentence a defendant as a juvenile or an adult is reviewed for an abuse of discretion. *Haynes, supra* at 595.

After reviewing the entire record, we find that the trial court properly considered the criteria set out in MCR 6.931(E)(3), examined the circumstances surrounding the offense and the offender, and concluded that defendant would best be placed within the adult system. We are unable to say that the trial court abused its discretion in sentencing defendant as an adult. The court's findings were supported by the record as a whole and thus were not clearly erroneous. *Brown, supra* at 505; *Miller, supra* at 612.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Alton T. Davis, Jr.

<sup>1</sup> The sentencing court declined to sentence defendant on his first-degree premeditated murder and armed robbery convictions for double jeopardy reasons.