

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY MAYES,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 182238

Genesee County

LC No. 94-050580

Before: McDonald, P.J., and Murphy and J. D. Payant*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 288.549, and was sentenced to thirty to fifty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that his conviction should be reversed because the trial court erred by not instructing the jury regarding the order of their deliberations on the principal charge of second-degree murder and the lesser included offense of voluntary manslaughter. Because defendant failed to object and because manifest injustice will not result from our refusal to review the issue, we decline to review this issue. *People v Handley*, 415 Mich 356; 329 NW2d 710 (1982), rev'd on other grounds 422 Mich 858 (1985); *People v Johnson*, 215 Mich App 658; 547 NW2d 65 (1996).

Next, defendant argues that the trial court abused its discretion by admitting a photograph which depicted the murder victim as she was discovered at the crime scene. Defendant contends that the photograph, which depicted the stab wounds to the victim's back, was more prejudicial than probative since it was not relevant to proving any element of the prosecution's case or his alibi defense. We find that the photograph meets the two-part test set forth by our Supreme Court in *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995). The photograph was relevant under MRE 401 because it was material and of sufficient probative force. It related to several facts of consequence to the case including the credibility of the police officers and the credibility of the prosecution's expert witnesses. Moreover,

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

the photograph depicted the body in relation to the crime scene and its proximity to scientific evidence which linked defendant to the crime. Furthermore, the photograph's probative value was not substantially outweighed by the danger of unfair prejudice under MRE 403. It is well-established that exclusion is not required based on gruesomeness alone. *Id.* The challenged photograph accurately depicted the victim's injuries and was not unusually gruesome or shocking. Therefore, the trial court did not abuse its discretion by admitting the photograph.

Defendant next argues that his conviction should be reversed because he was denied the effective assistance of counsel at trial. There is a presumption that defendant received effective assistance of counsel, and defendant must carry the heavy burden of proving otherwise. *People v Eloby*, 215 Mich App 472; 547 NW2d 48 (1996). In order to show that he was denied the effective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that counsel's deficient performance was prejudicial. *Id.*; *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Prejudice does not exist unless the court concludes that there is "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens, supra.* Our review is limited to the record in this case because defendant's motion to remand for an evidentiary hearing on this matter pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) was denied. *People v Barclay*, 208 Mich App 670; 528 NW2d 842 (1995).

Defendant challenges several of counsel's decisions at trial, but the record does not support his contention that these decisions amounted to deficient performance. Furthermore, considering the overwhelming scientific evidence which linked defendant to the crime, there is nothing in the record to indicate that defendant would have been acquitted of second-degree murder had counsel chosen the strategies urged by defendant on appeal. Therefore, we find that defendant was not denied the effective assistance of counsel at trial.

Defendant argues that counsel's failure to cross-examine two of the prosecution's expert witnesses amounted to ineffective assistance of counsel. The decision of whether to conduct cross-examination of a witness is considered a matter of trial strategy. *People v Brasic*, 171 Mich App 222; 429 NW2d 860 (1988). We find nothing in the record that meets defendant's burden to establish that the decision of counsel was not sound trial strategy. *People v LaVearn*, 448 Mich 216; 528 NW2d 721 (1995); *People v Daniel*, 207 Mich App 47; 523 NW2d 830 (1994). Therefore, it cannot be said that counsel's performance was deficient below a level of objective reasonableness. Furthermore, defendant has not made the requisite showing of prejudice. Defendant's bare allegation does not establish that counsel's decision not to cross-examine these two witnesses was outcome-determinative. *Pickens, supra.*

Defendant also points to the timing and brevity of counsel's opening statement and the content of counsel's closing argument. These decisions are also matters of trial strategy within the discretion of counsel. *People v Johnson*, 208 Mich App 137; 526 NW2d 617 (1994). The record gives us no indication that counsel's decisions regarding the opening statement and closing argument were based on

anything other than sound trial strategy. The record also fails to establish that defendant was prejudiced by counsel's opening statement and closing argument.

Defendant also asserts that counsel was deficient in failing to move for a directed verdict at the close of the prosecution's case. Defendant argues that the court might have granted the motion as to the charge of second-degree murder since the prosecution did not meet its burden of proving the elements. It is proper for a trial court to deny a motion for directed verdict when, after considering the evidence presented by the prosecution in a light most favorable to the prosecution, the court concludes that a rational trier of fact could find that the essential elements of the crime have been proven beyond a reasonable doubt. *People v Anderson*, 209 Mich App 527; 531 NW2d 780 (1995). The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). The prosecution introduced sufficient evidence on each of these elements so that a rational jury could find defendant guilty of second-degree murder. Counsel had no duty to argue a groundless motion, and defendant cannot predicate his ineffective assistance claim on this issue. *People v Rodriguez*, 212 Mich App 351; 538 NW2d 42 (1995).

Next, defendant contends that he was denied the effective assistance of counsel because counsel failed to object to the jury instructions when the trial court did not instruct the jury regarding the order of deliberations of the principal and lesser included charges. In this case, the defense strategy at trial was to present an alibi defense which, if believed, would result in an acquittal. In the face of this strategy, it would have been reasonable for counsel to conclude that an order of deliberations instruction would have confused the jury. Therefore, counsel's decision not to request an order of deliberations instruction did not amount to deficient performance. Furthermore, defendant has once again failed to point to anything in the record which would establish prejudice to the outcome of the trial. The jury was instructed on voluntary manslaughter and there is nothing in the record to suggest that if the jury had been given an instruction on the order of deliberations, defendant would have been acquitted of second-degree murder.

Finally, defendant argues that counsel's failure to object to comments made by the judge at sentencing deprived him of the effective assistance of counsel. Since we find that the comments made by the judge at sentencing were proper, we conclude that counsel's objection would have been groundless. Counsel's failure to make a groundless objection cannot amount to deficient performance. *Id.*

Finally, defendant argues that the trial court improperly considered his lack of remorse and failure to admit guilt at sentencing. Contrary to defendant's assertion, it is permissible for the trial court to consider a defendant's lack of remorse when imposing sentence. *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995); *People v Calabro*, 166 Mich App 389; 419 NW2d 791 (1988). It is impermissible for the trial court to base a defendant's sentence even partially on refusal to admit guilt. *People v Yennoir*, 399 Mich 892; 282 NW2d 920 (1977). We find that the trial court did not

consider the impermissible factor of refusal to admit guilt. Instead, the trial court considered the permissible factor, defendant's lack of remorse, along with other factors such as the heinous nature of the crime, including the mutilation of the victim's ear.

Affirmed.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ John D. Payant