

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYLE DEVON DANIEL,

Defendant-Appellant.

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UNPUBLISHED

February 18, 1997

No. 187848

LC No. 94-013823

Recorder's Court

Before: Michael J. Kelly, PJ., and Saad and H.A. Beach,\* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of 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). We affirm.

Defendant first argues that he was denied his state and federal constitutional right to due process and a fair trial because the prosecutor commented on defendant's silence during trial. We disagree. The prosecutor was not commenting on defendant's silence during trial, but rather was commenting on defendant's failure to deny or refute his admission to a third person that he shot the deceased. Such comment was entirely proper because while a prosecutor may not comment on a defendant's failure to testify, he or she may argue that certain inculpatory evidence is undisputed and uncontradicted. *People v Perry*, 218 Mich App 520, 538; \_\_\_ NW2d \_\_\_ (1996).

Defendant next argues that he was denied his sixth amendment right to effective assistance of counsel because counsel failed to refile a notice of alibi defense and failed to pursue a diminished capacity defense. We disagree. Defendant has failed to show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 299; 521 NW2d 797 (1994). There is no evidence showing that defendant had a viable alibi defense. The notice of alibi filed by different counsel in an earlier case is insufficient to show that defendant had a valid alibi defense in the instant case, particularly when the notice itself does not contain any evidence supporting the defense. There is also no evidence

showing that defendant had a viable diminished capacity defense. Defendant argues that his three suicide attempts several months prior to the instant offense should have prompted counsel to pursue a diminished capacity defense. There is nothing to indicate that these previous mental problems persisted, that they in anyway affected defendant's conduct on the day in question, or that counsel was even aware of these problems. In the absence of any evidence to support an alibi or diminished capacity defense, it can not be said that counsel's failure to pursue these defenses constituted ineffective assistance.

Defendant's final argument can be dismissed as moot. Defendant was initially credited an incorrect number of days in jail, but the error has since been corrected and defendant has been credited the proper number of days served.

Affirmed.

/s/ Michael J. Kelly  
/s/ Henry William Saad  
/s/ Harry A. Beach