

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN JOSEPH D'AGNILLO,

Defendant-Appellant.

UNPUBLISHED

April 25, 1997

No. 180327

Washtenaw Circuit Court

LC No. 93-001736-FC

Before: Young, P.J., and Gribbs, and S. J. Latreille,* JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and assault and battery, MCL 750.81; MSA 28.276. He was sentenced to concurrent terms of life imprisonment, and to a ninety day term for the assault and battery conviction. He appeals as of right. We affirm.

Defendant argues that retrial should have been barred because he did not personally consent to the granting of a mistrial of his first trial. We disagree. The mistrial was caused by innocent conduct of the prosecutor, defense counsel and judge and by factors beyond their control, and it was defense counsel who moved for the mistrial. Because defense counsel consented to the dismissal, defendant waived a double jeopardy claim and retrial was not barred. See *People v Dawson*, 431 Mich 234, 252-253; 427 NW2d 886 (1988); *People v Benton*, 402 Mich 47; 260 NW2d 77 (1977).

Defendant also contends that the trial court erred in not granting his request for substitute counsel made at the beginning of his second trial. An indigent defendant is guaranteed the right to counsel, but he is not entitled to have the attorney of his choice. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Id.*; *In re Conley*, 216 Mich App 41, 46; 549 NW2d 353 (1996). Although defendant argues that he had a substantial disagreement with defense counsel over the defense to be presented at trial, resulting in two inconsistent

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

defenses, we note that a defendant in a criminal matter may advance inconsistent defenses. *People v Cross*, 187 Mich App 204, 205-206; 466 NW2d 368 (1991). In this case, defense counsel relied primarily upon a defense of diminished capacity due to intoxication, which would negate the elements of premeditation and deliberation of first-degree murder, and, if successful, would have reduced the conviction to second-degree murder. *People v LaVearn*, 448 Mich 207, 213-214; 528 NW2d 721 (1995). There was testimony by many witnesses in support of this defense, including defendant's expert, Dr. Miller. All indications prior to trial were that defendant could not recall the events surrounding the murder and assaults, and there was a great deal of evidence implicating defendant in the commission of the crimes. Under these circumstances, defense counsel justifiably relied on the defense of diminished capacity rather than complete innocence.

Further, defendant's own testimony in this case (which was given against the strong advice of counsel) was contradicted by virtually all the evidence, severely undercutting defendant's credibility. Contrary to defendant's bare assertions otherwise, the record indicates that defense counsel was prepared and competent to represent defendant. Defense counsel brought numerous pretrial motions and appropriately challenged the prosecution's evidence throughout the trial. Counsel also interviewed numerous witnesses at defendant's request, although he did not call many of the witnesses when he discovered that they did not say what defendant expected they would say and that in some cases they would give adverse testimony. Because defendant's request for substitute counsel was dilatory and would have unreasonably disrupted the judicial process, and because defendant did not establish good cause, it cannot be said that the trial court abused its discretion in denying defendant's request for substitute counsel. *In re Conley*, *supra*.

Defendant's claim that he was deprived of the effective assistance of counsel on the bases noted above is likewise without merit. Defendant's motion for a *Ginther* hearing was denied by the trial court; therefore, this Court's review of defendant's ineffective assistance of counsel claim is limited to the facts apparent on the record to determine whether counsel's performance was deficient in that it fell below an objective standard of reasonableness and whether the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *Ginther*, *supra* at 443; *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). Defendant has not established that he was prejudiced by counsel's failure to recall him to the stand following Dr. Miller's testimony. Nor has defendant overcome the strong presumption that counsel's failure to call witnesses requested by him was sound trial strategy and that there is a reasonable probability that the result at trial would have been different had the witnesses testified. *People v Johnson*, 451 Mich 115, 122, 124; 545 NW2d 637 (1996); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995).

As to defendant's next claim, the trial court did not abuse its discretion in admitting evidence of his 1981 conviction for armed robbery. The evidence is somewhat probative and, because there is no similarity between murder and armed robbery, the prejudice was minimal as to the instant murder charge. See *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1992). Although there is some similarity between armed robbery and defendant's two assault convictions because they are all primarily assaultive crimes, any error in admission of the prior conviction as to the assault offenses is

harmless because reasonable jurors would have found defendant guilty of those crimes even if evidence of the prior conviction had been suppressed.

Further, the trial court did not abuse its discretion in allowing the prosecution's rebuttal expert witness to be called out of order, prior to testimony by defendant's expert witness. Under MRE 611, the mode and order of interrogation of witnesses and of the presentation of evidence is within the trial court's discretion. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). Contrary to defendant's assertion on appeal, defense counsel stated prior to the court's ruling on this matter that he intended to assert the defense of diminished capacity and that he wanted call the defense expert to testify in that regard. In addition, it appears that the change in the order of the expert witnesses was made to accommodate the schedules of both expert witnesses and defense counsel seemingly agreed with the court's resolution of the matter. Defendant's claim is without merit.

Next, viewing the evidence in a light most favorable to the prosecution, there was ample evidence of premeditation and deliberation for first-degree murder, especially the evidence regarding the placement and number of wounds on the victims and the evidence regarding defendant's conduct after the crimes. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). The trial court did not err in denying defendant a directed verdict on the first-degree murder charge.

Regarding the trial court's admission of the tracking dog evidence, we agree that there was no foundational evidence presented regarding the qualifications of the dog handler or the dog's training and accuracy in tracking. Therefore, the trial court erred in admitting the tracking dog evidence. *People v Laidlaw*, 169 Mich App 84, 93; 425 NW2d 738 (1988); *People v Harper*, 43 Mich App 500, 508; 204 NW2d 263 (1972). However, the error was harmless because there was abundant other corroborating evidence identifying defendant as the perpetrator and because the court properly instructed the jury regarding the use of the tracking dog evidence. *Laidlaw, supra* at 94-95; *People v McPherson*, 85 Mich App 341, 346; 271 NW2d 228 (1978). See CJI2d 4.14.

Finally, the trial court did not abuse its discretion in denying defendant a new trial or a *Ginther* hearing. We have determined that each of the claims on which defendant brought his motion for new trial are without merit and the trial court therefore did not abuse its discretion in denying the motion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). Furthermore, because the record was sufficient to allow the trial court to evaluate defendant's claims of ineffective assistance of counsel, the trial court did not abuse its discretion in denying defendant a *Ginther* hearing. See *Ginther, supra* at 442-443.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Roman S. Gribbs
/s/ Stanley J. Latreille