

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RAPHAEL FOLEY,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 182301

Genesee Circuit Court

LC No. 94-049839

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated 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 appeals as of right and we affirm.

Defendant first argues that he was denied effective assistance of counsel, alleging that trial counsel committed two highly prejudicial errors. In order to overcome the presumption that he received effective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that the deficient performance was prejudicial to defendant. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). We find that defendant has failed to meet his burden with respect to either of the alleged errors committed by trial counsel.

Defendant contends that trial counsel was ineffective because he elicited testimony from defendant that he had previously been convicted of retail fraud. Counsel used the information regarding defendant's criminal history during his closing argument to suggest that it was improbable that defendant, who did not have any prior convictions for assaultive behavior, committed the murder. We find that the decision to inquire about defendant's criminal history was a matter of trial strategy. The fact that the strategy may not have worked does not establish that counsel's performance was deficient. *People v Stewart (On Remand)*, 219 Mich App 38, 42; ___ NW2d ___ (1996). Moreover, defendant has failed to establish that he was prejudiced by the introduction of his conviction for retail fraud. Although he contends that the prosecutor effectively used this conviction to discredit him, the prosecutor's only

reference to the conviction was to respond to defendant's argument that, given his criminal record, it was unlikely that he committed the murder. Furthermore, the evidence against defendant was relatively strong. Although there were no eyewitnesses to the shooting, several witnesses testified that, on the night of the murder, defendant took a gun and ran in the direction where the body was eventually discovered. Witnesses also testified that they heard gunshots a short time after defendant left with the gun and that, upon his return, defendant admitted killing someone. Defendant also made statements to several people indicating that he had shot and killed the victim. In light of this evidence, we are not convinced that the jury would have had a reasonable doubt respecting defendant's guilt if it had not heard evidence of his prior retail fraud conviction. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Next, defendant claims that trial counsel's mistake in questioning him allowed the prosecution to introduce otherwise inadmissible evidence that defendant had a charge pending against him for delivery of cocaine. After defendant testified with respect to his retail fraud conviction, trial counsel asked whether defendant had any other "difficulties" with the law. Defendant replied that he did not. On cross-examination, the prosecution impeached defendant by asking whether he was in fact awaiting trial for a delivery of cocaine charge. Defendant attempted to explain why he did not consider this a "difficulty." Because defendant has failed to establish prejudice, we find that defendant's claim of ineffective assistance fails regardless of whether counsel's performance can be considered deficient for opening the door for the prosecution to introduce this evidence. Although the prosecution relied upon this exchange in attacking defendant's credibility during closing argument, defendant's credibility was already in question because his testimony that he was at home sleeping on the night of the murder was contradicted by several prosecution witnesses who testified that they were with him that night. Furthermore, we have already noted the strength of the evidence against defendant. Therefore, we find that defendant has also failed to establish prejudice from this alleged error of counsel. *Pickens*, *supra* at 312.

Defendant also argues that the trial court erred by failing to give CJI2d 16.9, which explains the difference between murder and voluntary manslaughter. Although defendant requested this instruction and the prosecution had no objections to its use, the trial court did not give the instruction to the jury for reasons not apparent in the record. However, because defendant did not object to the omission of the instruction, this Court is precluded from reviewing this issue unless necessary to avoid manifest injustice. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). We find that manifest injustice will not result by our declining to address this issue because the evidence adduced at trial did not support giving an instruction on voluntary manslaughter in the first instance. Although there was some evidence that defendant was agitated at the time that he shot the victim and that he stated that he was going to kill a man because he owed him money, this evidence was insufficient as a matter of law to support a finding of adequate provocation necessary to mitigate murder to manslaughter. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991).

Moreover, even if the trial court had committed error by omitting the requested instruction, reversal would not be warranted. The trial court instructed the jury on first-degree premeditated murder

and second-degree murder. Because the jury convicted defendant of first-degree premeditated murder, any error was harmless. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).

Next, defendant argues that he was denied a fair trial because the prosecution referred to prior consistent statements of four of its witnesses. Because defendant failed to raise this issue before the trial court, this Court may decline to review it absent manifest injustice. *People v Jolly*, 193 Mich App 192, 195; 483 NW2d 679 (1992), rev'd on other grounds, 442 Mich 458; 502 NW2d 177 (1993). We find no manifest injustice in this case. It was proper for the prosecution to refer to the prior consistent statements of witness Maurice Smith because both of the statements were made prior to his plea agreement with the prosecution, which defendant alleged had improperly influenced Smith. *People v Rodriguez (On Rehearing)*, 216 Mich App 329, 331; 549 NW2d 359 (1996). Although it may have been improper for the prosecution to refer to prior consistent statements of witnesses Robert Higgins and Sharon Hall, we find that these references do not warrant reversal. See *People v Rosales*, 160 Mich App 304, 308-309; 408 NW2d 140 (1987). Finally, defendant's argument that the prosecution improperly bolstered the testimony of witness Sonny Stingley is misplaced, because the prosecution actually referred to inconsistent statements in order to impeach Stingley's testimony at trial.

Finally, defendant argues that he was denied a fair trial because, during his rebuttal argument, the prosecutor improperly accused defense counsel of injecting "red herrings" into the case. We find that reversal is not required because all of the comments cited by defendant were responsive to defense counsel's closing argument. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski