STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT JOSEPH GREENBERG,

Defendant-Appellant.

UNPUBLISHED
July 1, 1997

No. 194247
Van Buren Circuit Court
LC No. 95-009633-FC

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of first-degree premeditated murder, MCL 750.315; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(1). We affirm.

We disagree with defendant's first claim that there was insufficient evidence of premeditation and deliberation to establish first-degree murder. Evidence of premeditation and deliberation may be inferred from the evidence presented at trial. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). We review the evidence in a light most favorable to the prosecution up to the time the motion for directed verdict was made to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Viewing the evidence in this manner, there was evidence that defendant was aware that the victim had recently come into a large amount of money and carried it in his pants pocket. The jury could reasonably infer from the evidence that defendant borrowed the shotgun as a pretext for the actual purpose of killing and robbing the victim and that, upon killing the victim, defendant moved the body to gain access to money in the victim's pocket. Defendant's "coolness" in committing the crime can be inferred from testimony that defendant acted normal before and after the shooting, was not agitated or excited, and was glad he had the second shotgun shell. Lack of an accident can be inferred from testimony by the firearms examiner that the shotgun had no defects, functioned properly, and had to be manually chambered to fire a second shot, and can be inferred from testimony by the pathologist that the shotgun was fired from four to ten feet away. Belying defendant's claim of self-defense was the fact that the victim's purported .44 Magnum was never found, the fact that

during defendant's interview with the police he never mentioned the gun to the police, and testimony by the pathologist regarding the victim's capability for only limited movement following the first shot. The trial court was correct in denying defendant's motion for directed verdict.

Second, the prosecutor did not engage in misconduct in commenting during opening argument on defendant's anticipated defense of self-defense, which the jury was told in voir dire would be an issue in the case. The prosecutor properly argued to the jury that, in essence, defendant was grasping for available defenses which might possibly be believed and that each of the defenses was unreasonable and unworthy of belief. Viewing the prosecutor's comments in context, they were a proper commentary of the unworthiness of belief of defendant's claimed defenses of accident and self-defense. *People v Bahoda,* 448 Mich 261, 266-267, 282; 531 NW2d 659 (1995); *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996).

Third, the trial court properly denied defense counsel's untimely request to instruct the jury on an intoxication defense. Defendant testified that he may have taken a few pills on the day of the murder. However, defendant did not claim and defense counsel did not argue that defendant was intoxicated *when he killed the victim*, let alone so intoxicated that he was incapable of forming an intent to commit the charged crimes. *People v Mills,* 450 Mich 61, 82-82; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995); *People v Johnson,* 215 Mich App 658, 673; 547 NW2d 65 (1996). Defendant's sister Janet Gofourth's testimony, on which defendant relies, indicated that she saw defendant "high" on May 29, 1995—the day after the murder occurred.

Finally, the trial court did not err in denying defendant's motion to suppress his statement to the police. Although intoxication from alcohol or other substances can affect the validity of a waiver of Fifth Amendment rights, it is not dispositive. *People v Leighty,* 161 Mich App 565, 571; 411 NW2d 778 (1987). Following our review of the entire record and deferring to the trial court's assessment of the credibility of the witnesses, we agree with the trial court that under the totality of the circumstances defendant's statement was knowing, intelligent, and voluntary when made. *People v Cheatham,* 453 Mich 1, 27, 29-30 (Boyle, J), 44 (Weaver, J); 551 NW2d 355 (1996); *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988).

Affirmed.

/s/ Hilda R. Gage
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald