

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT DUNNINGS,

Defendant-Appellant.

UNPUBLISHED
October 14, 1997

No. 189107
Recorder's Court
LC No. 93-007934

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

The jury convicted defendant of first-degree felony murder, MCL 750.316; MSA 28.548, and felony firearm, MCL 750.227b; MSA 28.424(2). Defendant appeals of right and we affirm.

I

Defendant first argues that his trial counsel was ineffective for failing to call defendant's trial counsel, two mental health professionals, and defendant to testify as to defendant's mental and emotional disability at the time he gave his statement to Sergeant Harvel. We disagree.

A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was deficient, falling below an objective standard of reasonableness, and (2) that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). A defendant must overcome the strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Here, defendant told officer Harvel that defendant had a twelfth grade education, that he could read and write, and that he understood each of the rights presented on the sheet before him. Defendant placed his initials next to each right and read each right aloud to Harvel correctly and coherently. Defendant did not slur his words or have any problem reading his rights, and there was no indication

that he was under the influence of alcohol or narcotics at that time. After giving his statement, defendant initialed each answer, signed each page, and made changes.

The evidence belies defendant's claim that his alleged mental and emotional disability affected the voluntariness of his confession. Trial counsel had the opportunity to testify and to call the two mental health professionals and defendant at trial and chose not to do so. Instead, trial counsel focused on the alleged accidental nature of the shooting as a defense, rather than on defendant's alleged mental and emotional disability. Although this defense was ultimately unsuccessful, defendant has failed to overcome the strong presumption that counsel's decision not to explore defendant's alleged disability was sound trial strategy, and that but for counsel's alleged error, there was a reasonable probability of a different outcome. Therefore, we hold that defendant was not denied the effective assistance of counsel.

Despite the fact that defendant has previously requested a remand from this Court, and that this request was denied, defendant again seeks a remand to create an evidentiary record about how his alleged mental and emotional disability affected the voluntariness of his confession. We decline defendant's invitation to review our previous decision on his motion to remand, in light of the law of the case doctrine. *People v Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994). We acknowledge that, in a criminal case, the law of the case doctrine is not an absolute bar to further consideration. *Id.* Nevertheless, we apply it here, because we are convinced that the trial court did not abuse its discretion in denying defendant's motions for a new trial and an evidentiary hearing since the voluntariness of defendant's confession had been sufficiently examined at the *Walker* hearing. At that hearing, defendant had ample opportunity to present his witnesses to support his theory that his confession was involuntary; he chose not to examine the mental health professionals he now wants to examine. Accordingly, the trial court's ruling on this issue was not clearly erroneous, but instead properly based on the evidence presented.

II

Defendant next incorrectly claims that the jury was improperly impaneled because the trial court called the remaining nine jurors from codefendant Shannon Fowler's jury pool first rather than pulling fourteen jurors from a larger pool. A defendant waives the issue of improper jury selection where, as here, he fails to exercise all available peremptory challenges and when he expresses satisfaction with the jury. See *People v Anderson*, 166 Mich App 455, 469; 421 NW2d 200 (1988).

III

Finally, defendant contends that the trial court clearly erred in admitting his confession because it was involuntary given. Defendant is wrong. The determination whether a confession was voluntary is a question of law for the trial court. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). In reviewing the trial court's findings, this Court examines the entire record to make an independent determination of voluntariness. *People v Bender*, 208 Mich App 221, 227; 527 NW2d 66 (1994), *aff'd* 452 Mich 594; 551 NW2d 71 (1996). However, we accord deference to the trial

court's superior ability to assess credibility and we reverse only if factual findings are clearly erroneous. *Id.*

In determining voluntariness, the court should consider, among other things, defendant's age, education, intelligence, and experience; the duration of the preconfession detention and questioning; any unnecessary delay in arraignment; defendant's physical and mental state; whether defendant was threatened or abused; and whether defendant was advised of his constitutional rights. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Here, defendant could read and write, and had a twelfth grade education. He was not in need of medical attention, and did not request food, water, a restroom, or sleep. The length of time between when defendant was advised of his rights and when he gave his statement was approximately an hour and fifteen minutes. Officer Harvel testified that he did not threaten or use improper force, nor did defendant complain of any such abuse from Harvel or others.

Based upon this evidence, the trial court correctly ruled that defendant confessed voluntarily. Defendant never invoked his right to remain silent, asked for an attorney, or refused to answer questions at any time during his meeting with Harvel. Defendant failed to present any evidence at the *Walker* hearing to contradict Harvel's testimony. Because we accord deference to the trial court's assessment of credibility, *Bender, supra*, we hold that defendant has failed to demonstrate that the trial court clearly erred in believing Harvel's testimony and in finding defendant's confession voluntary.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin