

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIL B. THOMAS,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 193869

Recorder's Court

LC No. 95-009634

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Defendant first argues that the trial court erred by giving a state of mind instruction that improperly shifted the burden of proof to defendant and created a conclusive presumption of guilt. We disagree. Defendant waived review of this issue by failing to object to the instruction and manifest injustice does not result from our refusal to review. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). The instruction was not erroneous because it only informed the jury that they may infer an intent to kill from the circumstances of the alleged killing. *People v Martin*, 392 Mich 553, 561; 221 NW2d 336 (1974) (malice may not be presumed or implied as a matter of law, but a jury may draw a permissive inference of malice from the use of a deadly weapon). Further, the jury instructions as a whole sufficiently conveyed to the jury that the burden of proof was on the prosecution, not the defense. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995) (jury instructions are to be read as a whole rather than extracted piecemeal to establish error). Defendant's claim of ineffective assistance of counsel for failure to object to this instruction was not properly presented as required by MCR 7.212(C)(5) and also fails on the merits because trial counsel did not err by failing to object as the instruction was not erroneous or otherwise objectionable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994) (to establish ineffective assistance of counsel, a defendant must show that "counsel's performance was below an objective standard of reasonableness under prevailing

professional norms” and that “there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different”).

Defendant next argues that the admission into evidence of the weapon he was arrested with as well as testimony that he was known to carry a gun was improper. We disagree. Defendant waived review of this issue by failing to object to the admission of this evidence and manifest injustice does not result from a refusal to review. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). The gun was relevant under MRE 401 and 402 as either evidence that defendant committed the murder with that weapon, despite the inconclusive ballistics examination, or as evidence corroborating defendant’s statement to the police that he disposed of the gun used in the shooting after the incident. The evidence was also relevant in demonstrating that defendant had access to such weapons. See *People v Taylor*, 195 Mich App 57, 61; 489 NW2d 99 (1992). This evidence was not prejudicial because it could have been utilized by either the prosecution or the defense and because, in defendant’s statement to the police, which was admitted into evidence, defendant admitted that he shot at the victim with a weapon of the same caliber. The testimony that defendant had previously been seen with a nine millimeter weapon could have been relevant evidence utilized by either party and was not prejudicial due to the admission of defendant’s statement. Defendant’s claim of ineffective assistance of counsel for failure to object to this instruction was not properly presented as required by MCR 7.212(C)(5) and also fails on the merits because trial counsel did not err by failing to object as the instruction was not erroneous or otherwise objectionable. *Stanaway*, *supra* at 687-688.

Defendant next argues that he is entitled to resentencing because the trial court improperly exceeded the sentencing guidelines based on its own impermissible determination that defendant was guilty of first-degree murder. We disagree. The trial court did not make an impermissible finding that defendant actually committed first-degree murder. The court considered the circumstances of the killing and determined that it was an aggravated second-degree murder that was very close to being a first-degree murder and that therefore, it was proper to exceed the sentencing guidelines. Although the sentence imposed exceeded the sentencing guidelines range, the trial judge presented sufficient reasons for exceeding the guidelines due to their inadequacy in this particular instance. See *People v Milbourn*, 435 Mich 630, 660; 461 NW2d 1 (1990).

Defendant also argues that his constitutional rights were violated by the trial court’s denial of his motion for expenses to obtain records from the Social Security Administration. We disagree. Defendant has failed to demonstrate that the trial court was required to grant his request in the absence of an inquiry into the need for these records. See *People v Davis*, 199 Mich App 502, 518; 503 NW2d 457 (1993) (an indigent defendant is entitled to a waiver of costs for court fees, transcripts, and expert witness services “reasonably necessary for his defense”). Although defendant did not specify the basis for his motion for expenses in either the motion itself or on appeal, a request for costs of obtaining records from a third-party is more closely analogous to the payment of expert witness fees, than to the appointment of appellate counsel or the provision of transcripts to indigent defendants at no cost. It is not error for a trial court to decline to appoint an expert witness in the absence of a showing that the expert testimony would likely benefit the defense, *People v Jacobson*, 448 Mich 639, 641; 532 NW2d 838 (1995), and therefore, it would not be error to decline defendant’s request because he has

failed to demonstrate the need for these documents. Defendant claims that these records could demonstrate that he received ineffective assistance of counsel, but given the result of the evidentiary hearing that was held on that issue and the findings of the trial judge, it is not likely that the result of that hearing could have been altered by the presentation of the social security records, even assuming that they exist. See *Stanaway, supra*. Therefore, even though the trial court did not explicitly deny defendant's motion on the basis that he failed to demonstrate a sufficient need for the documents, it was not an abuse of discretion to deny the motion. Cf. *In re Klevorn*, 185 Mich App 672, 678-679; 463 NW2d 175 (1990) (trial court abused its discretion by failing to pay fees for expert who provided valuable criticism of the conclusions reached by the prosecution's accident reconstruction expert).

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Peter D. O'Connell