STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 1997
v	No. 187368 Alpena Circuit Court
GERALD LEE ARBUCKLE, Defendant-Appellant.	LC No. 94-4681-FC

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard*, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a short-barreled shotgun/rifle, MCL 750.224(b); MSA 28.424(2). For these convictions, defendant was sentenced to serve prison terms of life imprisonment, two years, and three to five years, respectively. He appeals as of right and we affirm.

Defendant first argues that, pursuant to *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996), the trial court erred in admitting defendant's taped police statement. We disagree. In *Bender*, the Michigan Supreme Court adopted a per se rule that a suspect's waiver of rights to remain silent and to counsel is invalid when "the police fail to inform [the suspect], before he gives a statement, that a specific, retained attorney is immediately available to consult with him." *Id.* at 597. We find *Bender* distinguishable from the facts of the present case. First, the public defender who attended the line-up was called by the police, at the suggestion of the prosecutor, to insure the credibility of the lineup, not to represent defendant specifically. Second, although the attorney asked to speak to defendant before he gave his police statement, the attorney was neither retained by defendant nor by defendant's family. Cf. *Bender*, *supra* at 598; *People v Kevin Anthony Brown*, ___ Mich App ___ (Docket No. 202792, released 6/10/97). Defendant himself did not request counsel until after he had made his statement. Accordingly, because the attorney was neither "retained" nor appointed to represent defendant before he made his knowing and voluntary confession, the per se rule of *Bender* is inapplicable.

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

Defendant also argues that the trial court abused its discretion in refusing to allow him to present evidence concerning his knowledge of counsel's efforts to contact him. We find no abuse of discretion. A criminal defendant has a constitutional right to put before the jury all the circumstances surrounding the making of his confession regardless of the result of earlier suppression motions. *Crane* v *Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Questions of credibility are for the jury. *Id.* Here, however, defendant was unaware at the time he made his statement of counsel's efforts to talk to him. Thus, the evidence was irrelevant to the determination of his credibility and was properly excluded by the trial court.

Next, defendant argues that the trial court erred in refusing his request to instruct the jury on voluntary manslaughter. We find no error. Voluntary manslaughter is a cognate lesser included offense of second-degree murder. The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *People* v *Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Generally, the determination of whether these elements are met is a question of fact for the factfinder; however, when no reasonable jury could find that a lapse of time occurred during which a reasonable person could not control his passions, the judge should deny the requested manslaughter instruction as a matter of law. *Id.*, at 390, 392. Here, the trial court denied defense counsel's request for a voluntary manslaughter instruction because reasonable minds could not differ on the cooling-off period element. Specifically, the court found that during the ten minutes between the altercation and the shooting, defendant went home at 2:00 a.m., retrieved his gun from his bedroom, and began searching for the decedent. On these facts, we agree with the trial court that the ten-minute lapse of time was sufficient, as a matter of law, to allow defendant to control his passions. Accordingly, the trial court did not err in refusing to instruct the jury on voluntary manslaughter.

Finally, defendant argues that his life sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), given that defendant was a first-offender with an alleged "borderline personality disorder." Certainly, a sentence of parolable life is one of the most severe sentences a defendant may receive. *People v Carson*, 220 Mich App 662, 677; ___ NW2d ___ (1996). Here, in departing from the guidelines range of ten to twenty-five years, the trial court explained:

> Defendant has demonstrated no regard for human life. He aimed for the head of the victim and waited for the victim to move his arms to allow a better shot. He attempted to cover his trail following the shooting. He carefully and deliberately wiped his prints from the gun and threw it into a wooded area. Defendant has shown no remorse for his actions. Further, in the Court's opinion, he is a significant threat to the community.

We find that the trial court considered appropriate factors and imposed a sentence proportionate to the offender and the circumstances of the offense. Accordingly, the trial court did not abuse its discretion in imposing a parolable life sentence.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard