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STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MENAYETTA YEAGER, **No. 164055**

Defendant-Appellant.

Wayne County Circuit No. 17-008290-01-FC

Court of Appeals No. 34607

Plaintiff-Appellee's Appendix

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

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Plaintiff-Appellee's Appendix

REGISTER OF ACTIONS

CASE NO. 17-008290-01-FC

State of Michigan v Menayetta Michell Yeager

Case Type:	**Capital Felonies**
Date Filed:	**09/19/2017**
Location:	**Criminal Division**
Judicial Officer:	**Cox, Kevin J.**
Case Number History:	**17060252-01**
	17717673-01
Case Tracking Number:	**17717673-01**
CRISNET/Incident No.:	**1708270022**

RELATED CASE INFORMATION

Related Cases
17-008290-02-FH (Co Defendant)

PARTY INFORMATION

			Lead Attorneys
Appellate Attorney	**Office, Appellate Defenders**		
Appellate Attorney	**Office, Appellate Defenders**		
Defendant	**Yeager, Menayetta Michell** SID: MI3279366P	Female Black DOB: 07/19/1990	**Joseph A. Humphrey** *Retained* (313) 963-5310(W)
Plaintiff	**State of Michigan**		**Deborah K. Blair** (313) 224-8861(W)

CHARGE INFORMATION

Charges: Yeager, Menayetta Michell	**Statute**	**Level**	**Date**
1. Homicide - Murder First Degree - Premeditated	750/316-A	.	08/27/2017
2. Weapons Felony Firearm	750/227B-A	.	08/27/2017

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

08/30/2017 **Plea** (Judicial Officer: Anderson, Charles W., III)
1. Homicide - Murder First Degree - Premeditated
Defendant Stand Mute: Plea of Not Guilty Entered by Court

08/30/2017 **Plea** (Judicial Officer: Anderson, Charles W., III)
2. Weapons Felony Firearm
Defendant Stand Mute: Plea of Not Guilty Entered by Court

08/16/2018 **Disposition** (Judicial Officer: Cox, Kevin J.)
1. Homicide - Murder First Degree - Premeditated
Found Guilty by Jury
2. Weapons Felony Firearm
Found Guilty by Jury

09/06/2018 **Sentence** (Judicial Officer: Cox, Kevin J.)
1. Homicide - Murder First Degree - Premeditated
Fee Totals:
- Standard FEL Fees (SMCF, JCVF) $1,566.00
Fee Totals $ $1,566.00
State Confinement:
Agency: Michigan Department of Corrections
Effective 09/06/2018
Term: Life
Credit for Time Served: 374 Days

09/06/2018 **Sentence** (Judicial Officer: Cox, Kevin J.)
2. Weapons Felony Firearm
State Confinement:
Agency: Michigan Department of Corrections
Effective 09/06/2018
Term: 2 Yr to 2 Yr

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Credit for Time Served: 374 Days

OTHER EVENTS AND HEARINGS

08/30/2017 **Recommendation for Warrant**
08/30/2017 **Case Needs to Be Abstracted to MI Secretary of State**
08/30/2017 **Arraignment on Warrant** (9:00 AM) (Judicial Officer Anderson, Charles W., III)
Result: Defendant Stands Mute; Plea Of Not Guilty Entered By Court
08/30/2017 **Warrant Signed**
09/12/2017 **Pre Exam Hearing** (9:00 AM) (Judicial Officer Nance-Adams, Lydia)
Result: Held
09/19/2017 **Preliminary Examination** (9:00 AM) (Judicial Officer Nance-Adams, Lydia)
Result: Held: Bound Over
09/19/2017 **Bound Over**
09/26/2017 **Arraignment On Information** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Parties Present
Result: Defendant Stands Mute; Plea Of Not Guilty Entered By Court
09/26/2017 **Disposition Conference** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Parties Present
Result: Held
09/26/2017 **Calendar Conference** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Parties Present
Result: Held
09/27/2017 **Order For Production Of Exam Transcript Signed and Filed**
Constance Grimes, 9/19/17 Cap case
10/30/2017 **PE PDF Transcript, filed**
Constance Grimes, 9/19/17 Cap case
Vol./Book 1 44 pages
11/14/2017 **Final Conference** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Result: Adjourned at the Request of the Defense
11/16/2017 **Final Conference** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Parties Present
Result: Continued
12/07/2017 **Final Conference** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Parties Present
Result: Held
12/07/2017 **Order For A Competency Evaluation, Signed and Filed**
12/07/2017 **Order For Criminal Responsibility, Signed and Filed**
01/08/2018 *CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Adjourned:At The Request Of The Court
Adjourned:At The Request Of The Court
01/11/2018 **Appearance By A Retained Attorney Filed**
Joseph Humphrey
02/16/2018 **Competency Hearing** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Parties Present
Result: Adjourned at the Request of the Court
02/22/2018 **Competency Report Received**
Forwarded to courtroom.
02/27/2018 **Competency Hearing** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Parties Present
Result: Held
02/27/2018 **Defendant Competent To Stand Trial - Order Signed and Filed**
03/02/2018 *CANCELED* **Competency Hearing** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Adjourned:At The Request Of The Court
Adjourned:At The Request Of The Court
04/06/2018 *CANCELED* **Final Conference** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Adjourned:At The Request Of The Court
Adjourned:At The Request Of The Court
04/06/2018 **Case Reassigned**
04/27/2018 *CANCELED* **Final Conference** (9:00 AM) (Judicial Officer Kenny, Timothy M.)
Adjourned:At The Request Of The Court
Adjourned:At The Request Of The Court
05/29/2018 **Pre-Trial** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
Result: Held
06/04/2018 **Proof of Service, Filed**
(Clerk: Hood, B)
06/04/2018 **Witness List, Filed**
(Clerk: Hood, B)
06/04/2018 **Motion in Limine**
(Clerk: Hood, B)
06/04/2018 **Proof of Service, Filed**
(Clerk: Hood, B)
06/12/2018 **Motion Hearing** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
Result: Continued
06/15/2018 **Defense Reply**
06/15/2018 **Proof of Service, Filed**
06/19/2018 **Motion Hearing** (9:00 AM) (Judicial Officer Cox, Kevin J.)

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Parties Present
Result: Continued
06/20/2018 **Witness List, Filed**
06/20/2018 **Proof of Service, Filed**
06/21/2018 **Motion Hearing** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
Result: Held
06/25/2018 **Witness List, Filed**
06/25/2018 **Proof of Service, Filed**
08/03/2018 **Witness List, Filed**
08/03/2018 **Proof of Service, Filed**
08/10/2018 **Motion in Limine**
08/10/2018 **Proof of Service, Filed**
08/13/2018 **Jury Trial** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
05/21/2018 Reset by Court to 06/11/2018
06/11/2018 Reset by Court to 06/25/2018
06/25/2018 Reset by Court to 08/13/2018
Result: In Progress
08/14/2018 **Jury Trial** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
Result: In Progress
08/15/2018 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
Result: In Progress
08/16/2018 **Jury Trial in Progress** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
Result: Held
08/16/2018 **Found Guilty By Jury**
09/06/2018 **Sentencing** (9:00 AM) (Judicial Officer Cox, Kevin J.)
Parties Present
09/04/2018 Reset by Court to 09/06/2018
Result: Sentenced
09/06/2018 **Sentenced to Prison Order Signed and Filed**
10/02/2018 **Order For Production Of Trial And Sentence Transcript**
Video Courtroom (Sue Kinsey) MO 6/12/18, MO 6/19/18, MO 6/21/18, JT 8/13/18 - JT 8/16/18, SE 9/6/18
10/02/2018 **Stenographer Certificate Required**
Video Courtroom (Sue Kinsey) MO 6/12/18, MO 6/19/18, MO 6/21/18, JT 8/13/18 - JT 8/16/18, SE 9/6/18
10/02/2018 **Order For Production Of Transcript**
Shedria Blackman, AR 9/26/17, FC 11/16/17, FC 12/7/17, CH 2/16/18, CH 2/27/18
10/02/2018 **Stenographer Certificate Required**
Shedria Blackman, AR 9/26/17, FC 11/16/17, FC 12/7/17, CH 2/16/18, CH 2/27/18
10/02/2018 **Appointment for Claim of Appeal (Circuit)**
SADO appointed
10/04/2018 **Order For Production Of Transcript**
Constance Grimes, PRE 9/12/17
10/04/2018 **Stenographer Certificate Required**
Constance Grimes, PRE 9/12/17
10/09/2018 **Stenographers Certificate Filed**
Shedria Blackman, AR 9/26/17, FC 11/16/17, FC 12/7/17, CH 2/16/18, CH 2/27/18
10/09/2018 **Stenographers Certificate Filed**
Constance Grimes, PRE 9/12/17
10/09/2018 **Stenographers Certificate Filed**
Video Courtroom (Sue Kinsey) MO 6/12/18, MO 6/19/18, MO 6/21/18, JT 8/13/18 - JT 8/16/18, SE 9/6/18
10/25/2018 **Notice of Transcript Filed**
Video Courtroom (Sue Kinsey) MO 6/12/18, MO 6/19/18, MO 6/21/18, JT 8/13/18, 8/14/18 JT, 8/15/16 JT, JT 8/16/18, SE 9/6/18
Vol./Book 8 646 pages
11/13/2018 **PE PDF Transcript, filed**
Constance Grimes, PRE 9/12/17
Vol./Book 1 8 pages
01/10/2019 **Notice of Transcript Filed**
Shedria Blackman, AR 9/26/17, FC 11/16/17, FC 12/7/17, CH 2/16/18, CH 2/27/18
Vol./Book 5 35 pages
10/07/2019 **Miscellaneous, Filed**
10/07/2019 **Proof of Service, Filed**
11/25/2019 **Miscellaneous, Filed**
11/25/2019 **Proof of Service, Filed**
12/06/2019 **Attorney Removed - New Attorney Assigned**
retained attorney removed SADO appointed
02/03/2020 **Documents Prior to eFiling**
11/19/2020 **Brief Or Memorandum of Law**
11/19/2020 **Miscellaneous, Filed**
11/19/2020 **Miscellaneous, Filed**
11/19/2020 **Motion For A New Trial**
11/19/2020 **Proof of Service, Filed**
12/04/2020 **Miscellaneous, Filed**
02/18/2021 **Pre-Trial** (9:00 AM) (Judicial Officer Cox, Kevin J.)
@ noon
Result: Held

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06/10/2021	**Miscellaneous, Filed**
06/10/2021	**Proof of Service, Filed**
06/11/2021	**Appearance By People**
06/11/2021	**Proof of Service, Filed**
06/17/2021	**Evidentiary Hearing** (9:00 AM) (Judicial Officer Cox, Kevin J.) *@ 11:00* Parties Present Result: Adjourned at the Request of the Court
08/31/2021	**Evidentiary Hearing** (9:00 AM) (Judicial Officer Cox, Kevin J.) *@ 12:00* Parties Present *08/10/2021 Reset by Court to 08/31/2021* Result: In Progress
09/07/2021	**Order For Production Of Transcript** *Zoom hrg: Suzanne Kinsey GH 8/31/2021*
09/09/2021	**Notice of Transcript Filed** *Zoom hrg: Suzanne Kinsey GH 8/31/2021* Vol./Book 1 87 pages
09/14/2021	**Miscellaneous, Filed**
09/14/2021	**Miscellaneous, Filed**
09/14/2021	**Miscellaneous, Filed**
09/14/2021	**Proof of Service, Filed**
09/14/2021	**Proof of Service, Filed**
09/14/2021	**Brief Or Memorandum of Law**
09/21/2021	**Post Conviction** (9:00 AM) (Judicial Officer Cox, Kevin J.) Parties Present Result: In Progress
09/28/2021	**Evidentiary Hearing** (9:00 AM) (Judicial Officer Cox, Kevin J.) Parties Present Result: Held
09/28/2021	**Heard And Granted - Order Signed and Filed** (Judicial Officer: Cox, Kevin J.) *for new trial*
10/04/2021	**Order For Production of Prosecutor Transcript** *Zoom Hrg: Suzanne Kinsey, 9/21/2021, 9/28/2021*
10/04/2021	**Stenographer Certificate Required** *Zoom Hrg: Suzanne Kinsey, 9/21/2021, 9/28/2021*
10/08/2021	**Stenographers Certificate Filed** *Zoom Hrg: Suzanne Kinsey, 9/21/2021, 9/28/2021*
10/08/2021	**Notice of Transcript Filed** *Zoom Hrg: Suzanne Kinsey, 9/21/2021, 9/28/2021* Vol./Book 2 50 pages
12/21/2021	**Miscellaneous, Filed** *COA decision reversing trial court's decision to grant defendant a new trial.*

Financial Information

Defendant Yeager, Menayetta Michell

	Total Financial Assessment			1,937.26
	Total Payments and Credits			1,937.26
	Balance Due as of 08/29/2022			**0.00**
09/06/2018	Transaction Assessment			1,566.00
11/02/2018	Transaction Assessment			260.00
03/18/2019	Mail Payment	Receipt # 2019-22071	Yeager, Menayetta Michell	(108.18)
08/02/2019	Mail Payment	Receipt # 2019-61958	Yeager, Menayetta Michell	(128.64)
02/04/2020	Mail Payment	Receipt # 2020-10315	Yeager, Menayetta Michell	(173.49)
03/26/2020	Mail Payment	Receipt # 2020-25171	Yeager, Menayetta Michell	(163.12)
07/22/2020	Mail Payment	Receipt # 2020-49690	Yeager, Menayetta Michell	(210.98)
07/22/2020	Mail Payment	Receipt # 2020-49719	Yeager, Menayetta Michell	(103.40)
08/05/2020	Mail Payment	Receipt # 2020-53726	Yeager, Menayetta Michell	(170.16)
10/22/2020	Mail Payment	Receipt # 2020-77101	Yeager, Menayetta Michell	(113.09)
12/11/2020	Mail Payment	Receipt # 2020-94383	Yeager, Menayetta Michell	(34.66)
01/14/2021	Mail Payment	Receipt # 2021-03987	Yeager, Menayetta Michell	(121.06)
01/14/2021	Mail Payment	Receipt # 2021-04418	Yeager, Menayetta Michell	(25.00)
05/20/2021	Mail Payment	Receipt # 2021-38079	Yeager, Menayetta Michell	(8.82)
05/21/2021	Mail Payment	Receipt # 2021-38640	Yeager, Menayetta Michell	(38.02)
05/21/2021	Mail Payment	Receipt # 2021-38657	Yeager, Menayetta Michell	(50.00)
05/24/2021	Mail Payment	Receipt # 2021-39331	Yeager, Menayetta Michell	(25.00)
05/25/2021	Mail Payment	Receipt # 2021-39787	Yeager, Menayetta Michell	(9.66)
05/27/2021	Mail Payment	Receipt # 2021-40661	Yeager, Menayetta Michell	(23.02)
05/27/2021	Mail Payment	Receipt # 2021-40673	Yeager, Menayetta Michell	(50.00)
05/27/2021	Mail Payment	Receipt # 2021-40821	Yeager, Menayetta Michell	(23.02)
05/27/2021	Mail Payment	Receipt # 2021-40832	Yeager, Menayetta Michell	(50.00)
05/27/2021	Mail Payment	Receipt # 2021-40932	Yeager, Menayetta Michell	(50.00)
09/16/2021	Mail Payment	Receipt # 2021-69302	Yeager, Menayetta Michell	(113.09)
02/11/2022	Mail Payment	Receipt # 2022-10827	Yeager, Menayetta Michell	(35.42)
04/05/2022	Transaction Assessment			111.26
04/05/2022	Mail Payment	Receipt # 2022-24399	Yeager, Menayetta Michell	(111.26)

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to the conviction for first degree premeditated murder, count one, it is the sentence of this Court that you shall be sentenced to a period of life in prison, without parole.

As it relates to count two, the felony firearm conviction, it is the sentence of this Court that you are to serve the two year mandatory sentence, with credit for three hundred and seventy-four days.

Those sentences are to be served consecutively.

Lastly, your sentence will include your obligation to pay one hundred and thirty-six dollars in State costs; crime victim's assessment of a hundred and thirty dollars; and court costs of thirteen hundred dollars.

I must advise you, Ms. Yeager, that you are entitled to appellate review of this conviction and sentence.

If you're financially unable to retain a lawyer, the Court will appoint a lawyer to represent you, on your appeal.

However, your request for a lawyer must be made within forty-two days of today's date.

Uhm, Mr. Humphrey, has your client received her appellate rights form?

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and --

Q How did -- well, slow down.

How did he drag you out the van?

You stopped the van?

A Yes.

Q What happened next?

A He grabbed me by my hair.

Q And where is he, now?

A On top of me.

Q Is he still in the van, or outside the van?

A Inside the van.

Q What happens next?

A He drags me out by my hair.

Q What happens next?

A He get on top of me, and start punchin' me, and kickin' me.

Q What happens next?

A A few people was outside. They tried to help.

Q And so, did they?

A They couldn't, because he -- his gun had fell down his leg. And when he went to reach for it, everybody started backin' up.

Q What happened next?

A I took off runnin'.

Q What happened next?

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A Not really. He just was, like, is he gonna give you your van back?

And I was on the phone with him, arguin' about it.

He said that, since I called the Police on him, that he was gonna leave it at the gas station, on Van Dyke and Warren.

Q And that's why you were goin' there?

A Yes.

Q Did you go there?

A Yes.

Q Was he there?

A No.

Q And during this time, was Mr. Brooks threatening you?

A No.

Q He wasn't?

A No.

Q Okay. Uhm, what happened next?

A We had circled around the block, and I had called and told him that I went, and I didn't see white -- I didn't see the van.

He said, he pullin' up now.

So, we pulled back around, to there.

And he, he started yellin' in the phone, saw you with a nigger.

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I never seen him, but somehow he seen us.

Q Okay. And did he say anything after that?

He said -- after he said, you're with a, a nigger, did he say anything after that?

A Yes.

Q What?

A I'm gonna kill you and that nigger.

Q What happened next?

A Mr. Broom had stated that, at, won't you just leave the van, where it's at, and go about your business.

And they was havin' words, through the phone, like, like that.

Q So, Mr. Broom was talkin' to Jonte, through the phone?

A Yes.

Q Okay. Then what happened next?

A He just kept screamin', and hollerin', in the phone. Bitch, I'm gonna kill you and that nigger.

Q What happened next?

A We had kept drivin' down Van Dyke, and Jonte was screamin', pull over right there, pull over right there.

So, Labarren was pullin' in the gas station, and I just was shakin' my head, like, no, no, no.

Q What happened next?

A We pulled in the gas station, and, and there's --

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immediately after we pulled in the gas station, Jonte pulled in the gas station.

I was gonna get out and run, but Labarren handed me a gun.

Q What happened next?

A That's when it happened.

Q What happened?

A The shooting.

Q Okay. And, uhm, did you shoot?

A Yes.

Q Did -- if you know, how many times did you pull the trigger?

A Two or three times.

Q Where did you shoot?

A Towards the van.

Q Towards the van?

A Yes.

Q Okay. Why were you shooting at the van?

A I was scared.

Q Did you really think that Jonte was gonna kill you, that day?

A Yes.

Q You were in an abusive relationship?

A Yes.

Q You say, he had hit you, in this incident, in the face,

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A No. They drove off, flyin'.
Q Okay. All right. Did you see the person in the van with a gun, at any time?
A No, I did not.
Q Okay.
A Like I say, the only thing I -- they said, they say, when he did, like this, with the girl down the street.
Q Okay. Did you feel that, at the time that, uhm, Mr. Brooks was trying to run her over, that Miss Yeager's life was in danger?
A Of course it was.
Q Thank you.

MR. HUMPHREY: No further questions.

THE COURT: Counsel?

MS. SIMMONS: Just briefly.

REDIRECT EXAMINATION

BY MS. SIMMONS:
Q Mr. Borom, you testified to some sort of a hand gesture, being told to you, is that right?
A Mm-hmm. Yes.
Q But there was no actual weapon seen? It was a hand gesture, that was done?
A I, I -- no, it wasn't -- it -- just say it was a hand gesture.
Q Okay. Thank you.

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Q And what was she saying, when she got out of the car?
A She didn't say nothin', out, out the car. She, and she wasn't in the car.
Q Okay.
A She was on the street.
Q Okay. Did she -- did she chase after the white van?
A Yes, she was runnin' behind the truck.
Q Okay. And was she shooting, at that time?
A Yes. She shot at the truck.
Q Okay. Does she get back inside your vehicle?
A Yes.
Q What does she say, then?
A Follow, follow the truck. Follow him.
Q Did she say that -- anything about shooting up her own vehicle?
A Yes.
Q Okay.
A She, like, damn, I just shot my own truck up. Just, like that.
Q All right. Did you see the firearm, then?
A No, I didn't pay no attention. I was tryin' to see -- Pol, the Police right in front of me, lookin' at dead, in the, in the Police face. I'm, like, wow.
Q What, what's going through your mind, at this time?
A Like, get us, you know. Take us, now, you know.

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MR. HUMPHREY: Yes, sir.

THE COURT: Mr. Humphrey?

MR. HUMPHREY: Yeah.

Q (By Mr. Humphrey): And so --

MR. HUMPHREY: No further questions.

THE COURT: Miss Simmons?

REDIRECT EXAMINATION

CONTINUING BY MS. SIMMONS:

Q Mr. Borom, when --

A No, ma'am.

Q I'm sorry, Mr. Borom.

A No, ma'am.

Q When defendant Yeager gets back into your vehicle, she tells you to follow that bitch, correct?

A Yes.

Q Okay. And then, when she gets out of your vehicle, she says to you that she's going to get a drink and a cigarette?

A She -- I need a cigarette, that's right. Yes. That's exactly what she said.

THE COURT: Sir, you're gonna have to let the attorney finish her question --

WITNESS: Well, I, I just told her, no, I'm done.

THE COURT: Sir.

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Q Meaning, the Police?
A Yes.
And she, like, follow that bitch, you know.
And I, I like, no, we gotta go.
I went to the next turn, made a right, and we went to the house.
Q Okay. Does she say anything on the way to the house?
A No, she -- only thing she said, like, oh, my God, that was a green light store. We, we in trouble.
And I'm, like, wow.
I'm, like, what that mean?
Shit, you know, I didn't know what that meant, at the time.
Q Okay. And you said you drove back to your home, is that right?
A Yes.
Q Okay. And is that 3727 Concord?
A Yes.
Q Okay. And when does the defendant exit your vehicle?
A She exit it then. And I backed, backed the truck in.
Q Okay. And why did you back your truck in?
A So I can get to it, to jump it off, and get to my batteries, 'cause it's, it's up against the fence, to the house next door to me.
Q Okay. And does the defendant -- what does the

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And then you go into what most people think of, as the autopsy, which is where you open the cavities of the head, chest, abdomen, and pelvis, and you examine the internal organs, and you correlate any changes you see in the internal organs, with whatever you saw externally.

Q And what are the reported age, height, and weight of Mr. Jonte Brooks?

A He was six feet one, and a hundred and sixty-three, a hundred and sixty-three pounds.

Q And age?

A Twenty-nine years old.

Q Thank you.

Was there any evidence of injury noted on the body?

A He had a gun shot wound to the right upper back.

Q Okay. Is there a body diagram in your packet that you have, for Exhibit 247?

A I believe that there is.

Yes, there is.

Q Okay. Can you please describe what is noted on that body diagram?

A Well, the, the right -- the body diagram, basically, just --

THE COURT: Dr. Schmidt, can I interrupt you.

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A I gave it back to Mr. -- I mean, I don't know what happened to his gun.
Q You heard testimony, previously, in this trial, that no weapon was ever recovered from his person, or the vehicle, right?
A Yes.
Q Okay. What type of injuries did you sustain as a result of that assault, from Jonte Brooks, on Concord Street?
A I had a nose bleed, and a busted mouth.
Q Okay. Did you, did you still have a busted mouth, when you turned yourself in, on the 28th, late in the day?
A Yes.
Q What sort of medical attention did you receive for those injuries?
A I did not.
Q Okay. How did the gun get into your hand?
A Mr. Broom gave it to me.
Q Okay. And you, you took it from him?
A Yes.
Q And you held it, didn't you?
A Yes.
Q And you got out of the truck with it, didn't you?
A Yes.
Q And you pointed it at that van, didn't you?

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Q Now, is he -- are you guys communicating, in any way, during this time?
A Yes.
Q How so?
A Over the phone.
Q Who's calling who?
A We were calling each other.
Q Why were you callin' him?
A Because I was tryin' to get him to stay around the area, 'cause I knew the Police was comin'.
Q Okay. And then, what was that, for the purpose of what? To do what?
A So he can get in trouble.
Q Okay. And, well, why did you want him to get in trouble?
A 'Cause of the things, his actions that he had.
Q The actions he had perpetrated against you, that day?
A Yes.
Q Okay. Uh, so, what happens next?
A Uhm, I was still runnin' up the street. That's when Mr. Broom (as spoken) pulled up on me, and told me to get in before he came back.
Q What happened next?
A I got in.
Q What happened next?

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A Yes.
Q Okay. Uhm, you get back in the van -- I mean, the truck, correct?
A Yes.
Q What happened next?
A I was just nervous. I was just screamin', like, oh my God, oh my God. And Mr. Broom just pulled off.
Q What happened next?
A He pulled into --
Q He -- I'm sorry.
Did you tell Mr. Broom to follow that bitch?
A No.
Q Is that how you talk?
A No.
Q Uh, so, Mr. Broom pulls off?
What happened next?
A I was just screamin', oh my God, over and over again, because I was scared. I didn't know what to think, or what to do.
Q What happened next?
A He pulled back, where it all eventually started from.
Q On Concord?
A Yes.
Q What happened next?
A I got out, and I start walkin' down the street.

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jury instruction?

Did you request it, of the Court?

WITNESS: No, I didn't.

THE COURT: All right.

WITNESS: No, I did not. I do believe I asked for a, a misdemeanor instruction, of death -- shooting by injury resulting. I do believe I asked for that, which was a lesser.

THE COURT: Uhm, the jury instruction 16.9 indicates, the crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion, or anger, brought about by adequate cause, and before the defendant had reasonable time to calm down.

Uhm, are you aware of that?

WITNESS: I am aware of that instruction.

And that didn't fit into --

THE COURT: Okay.

Let, let me ask the questions.

WITNESS: The defense, and what she --

THE COURT: Let me ask you this question.

WITNESS: Okay.

THE COURT: Uhm, did the facts and circumstances that existed, as you understood them, suggest that an argu, argument could be made that the defendant acted out of passion, or anger, brought about

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Q They showed you some holes on the seats, correct?
A Yes.
Q If you know, where did some of those holes come from?
A From cigarette burns.
Q Okay. If -- okay. And, uhm, are you a smoker?
A Yes.
Q Is Jonte Brooks a smoker?
A Yes.
Q Okay. And, uhm, some of those holes had been there?
A Yes.
Q Okay. Oh, like, the one on the driver's seat, in the front?
A Maybe so.
Q Okay. Uhm, so, when you shot at that van, Ms. Yeager, you were in fear for your life?
A Yes.
Q All right.

MR. HUMPHREY: No further questions.

THE COURT: Ms. Simmons?

MS. SIMMONS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. SIMMONS:
Q Ms. Yeager, if I ask you something, and it doesn't make sense, please let me know, and I will rephrase it, okay?

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you're in Mack, in the street?
A No.
Q Okay. Does your memory come back to you, as you're runnin' back to Mr. Borom's truck?
A No.
Q Does your memory come back to you, when you're walking down Concord, later on that night?
A No. I was still scared.
Q And because you were fearful, you don't remember this incident?
A Yes.
Q This is a pretty significant event, wouldn't you agree, Ms. Yeager?
A I'm not sure.
Q Where did the gun go?
A I --
Q Once you got back into Mr. Borom's vehicle?
A I gave it back to him.
Q You were made that Mr. Brooks took your van, weren't you?
A I was hurt.
Q You would agree that your voice on that 9-1-1 call is rather angry, wouldn't you?
A No.
Q You were angry that he was playing games with you,

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Mr. Brooks was still on the attack, at that moment.

Is it true that Mr. Brooks was still attacking you, when he was at the gas station, on August 27, 2017?

A No, he wasn't putting his hands on me, but he was, like, verbally attackin' me, tellin' me things, like, he was gonna kill me, and stuff like that. And I believed everything that Mr. Brooks said and do, he do.

Q And at trial, and, and now, would you say that, uhm, when you shot, you were in fear for your life?

A Yes, I was.

Q Uhm, do you think you acted without thinking twice?

A Yes.

Q Did you have a reasonable time to calm down, between the physical assault, the car theft, and the ongoing verbal abuse?

A No.

Q Was the first time you heard about voluntary conversation, in conversations with me, your appellate attorney?

A Yes.

Q Okay.

Thank you, Miss Yeager.

I might have a couple of questions, after

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A Correct.
Q And instead, you claimed to be scared, isn't that correct?
A Correct.
Q And didn't you also tell your attorney, Mr. Humphreys, that you were scared of Mr. Brooks?
A Yes, I did.
Q And, specifically, you also testified that you did not want Mr. Brooks to be dead, correct?
A Correct. I still feel that way, today.
Q So, are you aware that, in order to be guilty of manslaughter, you have to intend to kill someone, or intend to do them great bodily harm, or knowingly create the risk of death, or great bodily harm? Are you aware of that?
A Now I am. I had no idea of a different defense. I did, couldn't tell you the difference between what murder to what murder was what, until now.

I didn't know what, I never heard anything about manslaughter, until talkin' to Miss Adrienne.
Q Okay. Well, in any of your testimony, that you claim was the truth, did you ever tell anyone that you intended to kill him, or do him great bodily harm, or knowingly create the risk of death or great bodily harm, to your boyfriend?

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the off -- the off time, compared to the actual time, which is your cell phone, which is on satellite time.

I, I take that footage, and I create a viewable format for court.

Uhm, in this instance, I actually cut the video into an event file, which shows the actual event, that we're here for today.

Q Okay. And did you have an opportunity to, to view that, on this computer, today?

A Yes.

Q Okay. And is that a fair and accurate depiction of the event file that you created, as it relates to this case?

A Yes.

Q Okay.

MS. SIMMONS: Your Honor, at this time, the People would move for admission of People's Proposed Exhibit 251?

MR. HUMPHREY: No objection.

THE COURT: Okay.

The Court will receive Exhibit 251 into evidence.

MS. SIMMONS: Thank you, Your Honor.

May I publish it to the jury, at this time?

THE COURT: You may.

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envelope.

It's got the Sunguard number, or the complaint number, if you will, which is 1708270022.

It indicates that there are seventeen nine millimeter shell casings contained in this envelope.

Uh, when my partner and I process evidence, we put red tape on it, so that when, whoever's going to examine the evidence, know that it hasn't been tampered with.

The State Police, I know the State Police processed this.

The reason why I know that, because they'll cut it either along the side, or at the bottom. They'll pull out the contents, examine it, put the contents back in here, and reseal it with their own tape.

There's seventeen individual envelopes. Each envelope contains one of the shell casings that were collected at the scene, numbered one through seventeen.

This one, here, that I just happened to have in my hand, is number one.

It indicates that it's a nine millimeter shell casing.

The State's information is, that it's item one of one. One nine millimeter Luger caliber F.C.

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fired cartridge case.

Uhm, it's got the submission date, and it's from the Firearm, Firearms Tool Mark Unit, Sergeant Molnar, Sergeant Dean Molnar, I guess it is.

Q Okay. And Officer Fitzhugh, are those the casings that you collected, from the gas station scene?

A Yes.

MS. SIMMONS: Your Honor, at this time, the People would move for admission of --

MR. HUMPHREY: No objection.

THE COURT: Okay.

The Court will receive into evidence Exhibit 258, "A" through "Q".

MS. SIMMONS: Thank you, Your Honor.

The People have nothing further.

THE COURT: Mr. Humphrey?

CROSS-EXAMINATION

BY MR. HUMPHREY:

Q Okay. Did you, you investigated the van, Officer?

A We did not.

Q Okay. So --

A That was done at a later time.

Q Did you participate in that?

A No.

Q Okay. All right. And so, what was your job with

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relation to the van, that evening, just to --

A Simply to photograph it, document where it came to rest, uhm, vehicles typically are not processed at the scene. They're usually taken to a garage, where we process them at the garage. We re-photograph 'em, search for and collect whatever evidence is in the van.

But that's done at a later time.

Q Okay. And those, the way those are numbered, that is not how the shots went, correct?

A No. There's an arbitrary number.

Q Okay. And also, too, as well as shell cases, especially in a place like a gas station, they could be moved, too, correct?

A They could get run over, they could get kicked. Uhm, anything could happen.

If it's a windy day, they could get blown.

Q So, where they are ultimately found, does not necessarily mean it's where they were shot?

A That's correct.

Q Okay. And, uhm, from you lookin' at the van, did you see seventeen holes in the van?

A I did not.

Q Okay. And, uhm, did you see any holes to the in, in the, in the interior of the car?

A I don't recall. But, again, I didn't do a thorough

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examination of the van.

Q Okay. And, uhm, when you arrived at the scene, were there any people around the vehicle?

A The, the van?

Q Mm-hmm.

A Uh, no. Well, I don't know. When we got the run to go to Mack and Seneca.

Q Mm-hmm.

A But en route to Mack and Seneca, we were comin' down Van Dyke, and that's when we realized that the number of Officers at Mack and Van Dyke, indicated to us, the incident started there. So, that's where we started. We didn't start where we were given the run to. We started where the incident started.

And then, proceeded to Mack and Seneca.

Q Okay. All right.

MR. HUMPHREY: I have no further questions.

THE COURT: Miss Simmons?

REDIRECT EXAMINATION

BY MS. SIMMONS:

Q Officer Fitzhugh, did you check the area of the gas station for discharged bullets?

A I checked the church, which is directly across the street. I don't remember the name of the church. I want to say, Mt. Zion.

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Q Okay. Not the same church that we've been talking about, but a, a, a church that's closer to the --
A Correct.
Q Gas station?
A Correct. It's on the north, it would be the northeast corner of Van Dyke and Mack. Probably a two or three story church.

I checked the, what would be the west side of the church, to see if I saw any bullet impacts.

I did not.

Q Okay.

MS. SIMMONS: Thank you, Officer Fitzhugh.

The People have nothing further.

THE COURT: Mr. Humphrey?

RECROSS-EXAMINATION

BY MR. HUMPHREY:

Q Uhm, did you find any other bullet impact strikes?
A I did not.
Q Okay.

MR. HUMPHREY: Thank you.

THE COURT: Uh, ladies and gentlemen of the jury, if you have a question for the witness, please raise your hand?

Seeing no hands.

You may step down.

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And it's part -- based on what the Court's ruled, prior to the --

THE COURT: All right.

You want to come forward, counsel?

(Whereupon a discussion was had off the record, at the bench, from 9:50 a.m. to 9:52 a.m.)

THE COURT: Uhm, for the record, counsel, are you objecting to the admission?

MR. HUMPHREY: Yeah, 'cause it's more prejudicial than probative.

THE COURT: Okay.

The Court is going to overrule the objection.

You may -- the Court will receive into evidence Exhibit 253.

MS. SIMMONS: Thank you, Your Honor.

May I publish it to the jury?

THE COURT: You may.

MS. SIMMONS: Okay.

(Whereupon People's Exhibit No. 253 was played in open court from 9:53 a.m. to 9:55 a.m.)

Q (By Ms. Simmons): Now, Mr. Fortune, do you identify the sh -- do you see the shooter?

A Yes.

Q Who you spoke of, in that recording, in court today?

A Yes.

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Before he pulled in there, the had chosen to be law enforcement.

She'd chosen to be the Police.

She had chosen to be the Judge, the judge of Mr. Brooks.

She had chosen to be the jury.

And she chose to be his executioner.

Her actions were not lawful.

They are not acceptable.

They are excusable.

Ladies and gentlemen, you took an oath at the beginning of this trial, to follow the law.

You pledged to follow the Court's instruction.

In applying the law to the facts in this case, you must find the defendant guilty.

Thank you.

JURY INSTRUCTIONS

THE COURT: Members of the jury, the evidence and the arguments in this case are finished, and I will now instruct you on the law.

That is, I will explain the law that applies to this case.

And I do want to let you know, that when you are in the jury room deliberating, you will have a copy

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of the instructions that I'm about to read to you, in the event that you want to refer to these instructions, at any time.

Remember that you've taken an oath to return a true and just verdict, based only on the evidence, and my instructions on the law.

You must not let sympathy or prejudice influence your decision.

As jurors, you must decide what the facts of this case are. This is your job, and nobody else's.

You must think about all the evidence, and then decide what each piece of evidence means, and how important you think it is.

This includes whether you believe what each of the witnesses said.

What you decide about any fact in this case is final.

It is my duty to instruct you on the law. You must take the law as I give it to you.

If a lawyer said something different about the law, follow what I say.

At various times, I've already given you some instructions about the law.

You must take my, all of my instructions together as the law you must follow.

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You should not pay attention to some instructions, and ignore others.

To sum up, it is your job to decide what the facts of this case are; to apply the law as I give it to you; and in that way, to decide this case.

A person accused of a crime is presumed to be innocent.

This means that you must start with the presumption that the defendant, Ms. Yeager, is innocent.

This presumption continues through the trial, and entitles Ms. Yeager to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that she is guilty.

Every crime is made up of parts called elements.

The Prosecutor must prove each element of the crimes beyond a reasonable doubt.

The defendant is not required to prove her innocence, or to do anything.

If you find that the Prosecutor has not proven each element beyond, beyond a reasonable doubt, then you must find the defendant not guilty.

A reasonable doubt is a fair, honest doubt, growing out of the evidence, or lack of evidence. It

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is not merely an imaginary, or a possible doubt, but a doubt based on reason and common sense.

A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

When you discuss the case, and decide on your verdict, you may only consider the evidence that was properly admitted in this case.

Therefore, it’s important for you to understand what is evidence, and what is not evidence.

Evidence includes only the sworn testimony of the witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

Many things are not evidence, and you must be careful not to consider them as such.

I will now describe some of the things that are not evidence:

The fact that the defendant is charged with a crime, and is on trial, is not evidence.

Likewise, the fact that she’s charged with more than one crime, is not evidence.

The lawyers’ statements, and the lawyers’ arguments, and any commentary, are not evidence.

They are only meant to help you understand

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the evidence, and each side's legal theories.

You should only accept things the lawyers say that are supported by the evidence, or by your own common sense, and general knowledge.

The lawyers' questions to the witnesses, or your questions to the witnesses, and my questions to the witnesses, are also not evidence.

You should consider these questions only as they give meaning to the witness's answers.

My comments, my rulings, my questions, and these instructions are also not evidence.

It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case.

However, when I make a comment, or give an instruction, I am not trying to influence your vote, or express a personal opinion about the case.

If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion.

You are the only judges of the facts, and you should decide this case from the evidence.

At times during the trial, I've excluded evidence that was offered, or stricken testimony that was heard.

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Do not consider those things in deciding this case.

Make your decision only on the evidence that I let in, and nothing else.

Your decision should be based on all the evidence, regardless of which party produced it.

You should use your own common sense, and general knowledge, in weighing and judging the evidence, but you should not use any personal knowledge you may have about a place, a person, or an event.

To repeat once more, you must decide this case based only on the evidence admitted during this trial.

As I mentioned earlier, it is your job to decide what the facts of the case are.

You must decide which witnesses you believe, and how important you think their testimony is.

You do not have to accept or reject everything a witness said. You are free to believe all, or none, or part of any person’s testimony.

In deciding which testimony you believe, you should rely on your own common sense, and every day experience.

However, in deciding whether you believe a witness’s testimony, you must set aside any bias, or

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prejudice you may have, based on the race, gender, or national origin of the witness.

There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:

Was the witness able to see or hear clearly?

How long was the witness watching or listening?

Was anything else going on that may have distracted the witness?

How did the witness seem -- I'm sorry.

Did the witness seem to have a good memory?

How did the witness look and act while testifying?

Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions, or argue with the lawyers?

Does the witness's age and maturity affect how you judge his or her testimony?

Does the witness have any bias, prejudice, or personal interest in how this case is decided?

Have there been any promises, threats, suggestions, or other influences that affected how the witness testified?

In general, does the witness have any special

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reason to tell the truth, or any special reason to lie?

All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

Sometimes the testimony different witnesses will not agree, and you must decide which testimony you accept.

You should think about whether the disagreement involves something important, or not; and whether you think someone is lying, or is simply mistaken.

People see and hear things differently, and the witnesses may test, testify honestly, but simply be wrong about what they thought they saw or remembered.

It is also a good idea to think about which testimony agrees best with the other evidence in the case.

However, you may conclude that a witness deliberately lied about something that is important to how you decide this case.

If so, you may choose not to accept anything that witness said.

On the other hand, if you think the witness lied about some things, but told the truth about others, you may simply accept the part you think is

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true, and ignore the rest.

The Prosecutor must also prove beyond a reasonable doubt that the crime occurred on or about August 27, 2017, within Wayne County.

As I mentioned earlier, when you go to the jury room, you will, you will be provided with a copy of these final instructions.

You should first choose a Foreperson.

The Foreperson should see to it that your discussions are carried on in a businesslike way, and that everyone has a fair chance to be heard.

A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict.

In the jury room, you will be discussing -- I'm sorry.

You will discuss the case among yourselves, but ultimately, each of you will have to make up your own mind.

Any verdict must represent the individual considered judgment of each juror.

It is your duty, as jurors, to speak to each other, and to make every reasonable effort to reach agreement.

Express your opinions, and the reasons for

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them, but keep an open mind as you listen to your fellow jurors.

Rethink your opinions, and do not hesitate to change your mind, if you decide you were wrong.

Try your best to work out your differences.

However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you, or just for the sake of reaching a verdict.

In the end, your vote must be your own, and you must vote honestly, and in good conscience.

If you have any questions about the jury instructions before you begin deliberating, or questions about the instructions that arise during deliberations, you may submit them, in writing, to the Deputy.

Now, possible penalty should not influence your decision. It is the duty of the Judge to fix the penalty within the limits provided by law.

If you wish to communicate with me while you're in the jury room, please have your Foreperson write a note, knock on the door, and then give it to the Deputy.

It is not proper for you to speak directly

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with the Judge, the lawyers, the Court Officers, or other people involved in the case.

As you discuss the case, you must not let anyone, even me, know how your voting stands.

Therefore, until you return with a unanimous verdict, do not reveal this to anyone outside the jury room.

Of course, when you go to the jury room to deliberate, you may take your notes, and of course you're gonna have these full set of instructions.

If you want to look at any or all of the referenced, referenced documents, or the exhibits that have been admitted, just ask for them.

As you discuss this case, you should think about all my instructions together, as the law you are to follow.

Now, the defendant is charged with two counts. That is, with the crime of first degree premeditated murder; the less serious crime of second degree murder; and possession of a firearm at the time of a commission of a felony, which is referred to as felony firearm.

These are separate crimes, and the Prosecutor is charging that the defendant committed both of them.

You must consider each crime separately, in

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light of all the other -- uh, in light of all the evidence in the case.

You may find the defendant guilty of all, or any one of these crimes, guilty of a less serious crime, or not guilty.

The Court has prepared a verdict form listing the possible verdicts, and that will be provided to you when you are in the jury room.

Now, facts can be proven by direct evidence from a witness or an exhibit.

Direct evidence is evidence that -- about what we actually see or hear.

For example, if you look outside, and see rain falling, that is direct evidence that it is raining.

Facts can also be proven by indirect, or circumstantial evidence.

Circumstantial evidence is evidence that normally, or reasonably leads to other facts.

So, for example, if you see a person coming in from the outside, wearing a rain coat, covered with small drops of water, that would be circumstantial evidence that it is raining.

You may consider circumstantial evidence.

Circum -- circumstantial evidence by itself,

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or a combination of circumstantial evidence and direct evidence can be used to prove the elements of a crime.

In other words, you should consider all the evidence that you believe.

There has been some evidence that the defendant tried to walk -- run away, and or tried to hide, and or ran away, and or hid after the alleged crime, and -- and or, when she was accused of a crime.

This evidence does not prove guilt.

A person may run or hide for innocent reasons, such as panic, mistake, or fear.

However, a person may also run or hide because of consciousness of guilt.

You must decide whether the evidence is true.

And if true, whether it shows that the defendant had a guilty state of mind.

You've heard evidence that before trial, a witness, or witnesses made a statement, or statements, that may be inconsistent with his or her, or their testimony, here in court.

You may consider an inconsistent statement made before trial, to help you decide how believable the witness's testimony was when testifying here in court.

If the earlier statement was made under oath,

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then you may also consider the earlier statement as evidence of the truth of whatever the witnesses said in the earlier statement, when determining the facts of this case.

When the lawyers agree on a statement of facts, these are called stipulated facts.

You may regard such stipulated facts as true, but you are not required to do so.

You may consider whether the defendant had a reason to commit the alleged crime, but a reason, by itself, is not enough to find a person guilty of a crime.

The Prosecutor does not have to prove that the defendant had a reason to commit the alleged crime.

The Prosecutor only has to show that the defendant actually committed the crime, and that she meant to do so.

The defendant’s intent may be proven by what she said, what she did, how she did it, or by any of other facts and circumstance in evidence.

You should not decide this case based on which side presented more witnesses.

Instead, you should think about each witness, and each piece of evidence, and whether you believe them.

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Then, you must decide whether the testimony and the evidence you believe proves beyond a reasonable doubt that the defendant is guilty.

You've heard that a lawyer, or a lawyer's representative spoke to one of the witnesses.

There is nothing wrong with this.

A lawyer or a lawyer's representative may speak to a witness, to find out what the witness knows about the case, and what the witness's testimony will be.

You have heard testimony from witnesses, including Sergeant Dean Molnar, who has given you his opinion as an expert in the field of Firearms and Tool Marks.

And from a witness, Carl Schmidt, who has given you his opinion as an expert in the field of Forensic Pathology.

Experts are allowed to give opinions, in court, about matters that they are expert on.

However, you do not have to believe an expert's opinion.

Instead, you should decide whether you believe it, and how important you think it is.

When you decide whether you believe an expert's opinion, think carefully about the reasons and

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facts he or she gave for -- I'm sorry, he gave, for his opinion; and, whether those facts are true.

You should also think about the expert's qualifications, and whether his opinion makes sense when you think about all the other evidence in the case.

You've heard testimony from a witness who is a Police Officer.

That testimony is to be judged by the same standards you use to evaluate the testimony of any other witness.

The defendant claims that she acted in lawful self-defense.

A person has the right to use force, or even take a life, to defend herself under certain circumstances.

If a person acts in lawful self-defense, that person's actions are justified, and she is not guilty of first degree premeditated murder.

You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful self-defense.

Remember to judge the defendant's conduct according to how the circumstances appeared to her at the time she acted.

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First, at the time she acted, the defendant must have honestly and reasonably believed that she was in danger of being killed, and or seriously injured, and or sexually assaulted.

If the defendant's belief was honest, and reasonable, she could act immediately to defend herself even if it turned out later that she was wrong about how much danger she was in.

In deciding if the defendant's belief was honest, and reasonable, you should consider all the circumstances as they appeared to the defendant at that time.

Second, a person may not kill or seriously injure another person just to protect herself against what seems like a threat of only minor injury.

The defendant must have been afraid of death, and or serious physical injury, and or sexual assault.

When you decide if the defendant was afraid of one or more of these, you should consider all the circumstances: The condition of the people involved, including their relative strength; whether the other person was armed with a dangerous weapon, or had some other means of injuring the defendant; the nature of the other person's attack or threat; and -- I'm sorry. Whether the defendant knew about any previous violent

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acts, or threats, made by the other person.

Third, at the time she acted, the defendant must have honestly and reasonably believed that what she did was immediately necessary.

Under the law, a person may only use as much force as she thinks is necessary, at the time, to protect herself.

When you decide about -- I'm sorry.

When you decide whether the amount of force seemed to be necessary, you may consider whether the defendant knew about any other ways of protecting herself, but you may also consider how the excitement of the moment affected the choice the defendant made.

A person can use deadly force in self-defense only where it is necessary to do so.

If the defendant could have safely retreated, but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed she needed to use deadly force in self-defense.

However, a person is never required to retreat, if attacked in her own home; nor, if the person reasonably believes that an attacker is about to use a deadly weapon; nor, if the person is subject to a sudden, fierce, and violent attack.

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Further, a person is not required to retreat, if that person has not, or is not engaged in the commission of a crime, at the time of -- at the time the deadly force is used; and has the, the legal right to be where the person is, at the time; and, has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent death, and or great bodily harm, and or sexual assault of the person or another.

Now, the defendant does not have to prove that she acted in self-defense.

Instead, the Prosecutor must prove, beyond a reasonable doubt, that the defendant did not act in self-defense.

Now, there has been some evidence that the decedent may have had a reputation for cruelty or violence.

You may consider this evidence when you decide whether it was likely that the defendant threatened to hurt the defendant physically, and whether the defendant honestly and reasonably feared for her safety.

You must think about all the evidence in deciding what the defendant’s state of mind was, at the time of the alleged killing.

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The defendant's state of mind may be inferred from the kind of weapon used; the types of wounds inflicted; the acts and words of the defendant; and any other circumstance -- I'm sorry. And any other circumstances surrounding the alleged killing.

You may infer that the defendant intended to kill if she used a, a dangerous weapon in a way that was likely to cause death.

Likewise, you may infer that the defendant intended the usual results that follow from the use of a dangerous weapon.

A gun is a dangerous weapon.

A dangerous weapon is any instrument that is used in a way that is likely to cause physical injury -- I'm sorry. Serious physical injury, or death.

Premeditation and deliberation may be inferred from any actions of the defendant which show planning; or from any other circumstances surrounding the killing.

The Prosecutor need not prove a motive for the killing, but you may consider evidence of motive in deciding if there was premeditation and deliberation.

Motive, by itself, does not prove premeditation and deliberation.

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In count one, the defendant is charged with the crime of first degree premeditated murder.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused the death of Jonte Brooks.

That is, that Jonte Brooks died as a result of a gun shot wound.

Second, that the defendant intended to kill Jonte Brooks.

Third, that this intent to kill was premeditated.

That is, thought out before hand.

Fourth, that the killing was deliberate, which means that the defendant considered the pros and cons of the killing, and thought about, and chose her actions before she did it.

There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill.

The law does not say how much time is needed.

It is for you to decide if enough time passed, under the circumstances of this case.

The killing cannot be the result of a sudden

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impulse, without thought or reflection.

Fifth, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.

In count one, you may also consider the lesser charge of second degree murder.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused the death of Jonte Brooks.

That is, that Jonte Brooks died as a result of a gun shot wound.

Second, that the defendant had one of these three states of mind:

She intended to kill;

Or, she intended to do great bodily harm to Jonte Brooks;

Or, she knowingly created a very high risk of death, or great bodily harm, knowing that death or such harm would be the likely result of her actions.

Third, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.

If you find that the defendant -- I'm sorry.

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If you find the defendant guilty of murder, you must state, in your verdict, whether it is murder in the first degree, or murder in the second degree.

In count two, the defendant is charged with the separate crime of possession a firearm at the time she committed the crime of murder.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant committed the crime of murder, which has been defined for you.

It is not necessary, however, that the defendant be convicted of that crime.

Second, that at the time the defendant committed that crime, she knowingly carried, or possessed a firearm.

An individual who has not, or is not engaged in the commission of a crime, at the time he or she uses deadly force, may use deadly force against another individual anywhere he or she has the legal right to be, with no duty to retreat, if either of the following applies:

“A”, that the individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent or -- of, or imminent

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great bodily harm to himself, or herself, or to another individual.

And “B”, the individual honestly, and reasonably believes that the use of deadly force is necessary, to prevent the imminent sexual assault of himself, or herself, or of another individual.

Counsel, can you please approach?

(Whereupon a discussion was had off the record, at the bench, at 2:42 p.m.)

THE COURT: Madame Clerk, at this time, can we excuse two of our jurors?

CLERK: Juror number seven, and juror number nine.

THE COURT: Okay.

Ms. Youngblood, and Ms. Hill, I would like to thank both of you, sincerely, for your patience, and for your participation in this case.

Uhm, you have been -- you are now excused from jury service in this case.

Uhm, I’m gonna have you return to the jury room, collect your personal things.

Uhm, and then, when you -- the Deputy will let you leave.

And if you would be good enough to wait in the hallway, for just a minute, uh, the Deputies will

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give you, uhm, a letter indicating that, where you've been for this last several days, if you need it for your employer, or somebody like that.

So, once again, thank you for your service.

Uhm, you may retire to the jury room to pick up your personal effects.

Thank you.

(Whereupon the alternate jurors were excused at 2:42 p.m.)

THE COURT: Okay.

Madame Clerk, at this time, can you please swear our Deputies?

CLERK: Do you solemnly swear to keep this jury in the manner and form as prescribed by law?

DEPUTY: I do.

DEPUTY: I do.

THE COURT: Okay.

Ladies and gentlemen, at this time, I'm gonna have you retire to the jury room.

In just a minute, we will bring in a set of the final instructions, and the verdict form.

All right?

Thank you.

DEPUTY: All rise for the jury.

(Whereupon the jurors were excused from the

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courtroom, to begin deliberations, at 2:44 p.m.)

DEPUTY: You may be seated.

THE COURT: Okay.

We are still, uhm, on the record, and outside the presence of the jury.

Uhm, I do want to indicate, for the record, that when I finished reading the instructions, I did call counsel forward, and ask them if they had any objection to the instructions, as read.

You know, whether I missed any, mispronounced anything, missed a sentence here or there?

Uhm, Ms., Ms. Simmons, do you have any objections to any of the above, or the instructions?

MS. SIMMONS: No, Your Honor.

MR. HUMPHREY: No.

THE COURT: Mr. Humphrey?

MR. HUMPHREY: I'm -- no, Your Honor.

THE COURT: Okay.

Let me also -- you may be seated.

Uhm, I've been meaning to do this, and, uhm, on the record, I just want to indicate that after our first witness testified, and was dismissed, I don't know if it was the next morning, there was a number of questions that were written by, perhaps, various members of the jury.

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And, uhm, uhm, I do remember telling the jurors, at some point in time, that their questions had to be written, so that when the witness was done testifying, at -- or done, done being cross-examined, and before the witness was excused, uhm, I think we recall that.

But I do want to put on the record, there was four questions that were submitted after the first witness was excused.

The question, from one of the jurors was: Opening statement by the Prosecutor said seventeen shots were fired.

Only one hit Mr. Brooks.

The first shot, question mark, mark, or the seventeenth, question mark.

Please explain the type of weapon that does this.

Where do sixteen bullets go?

Uhm, I do believe you folks had an opportunity to review the, the question.

Uhm, but, again, the witness was excused.

And I don’t even remember if those were general questions.

I don’t even remember what the subject matter of the first witness was.

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But, uhm, I just want to put that on the record.

The second question that was given to the Court, at the same time, was: When the defendant turned herself in, did she have gun powder on her hands, or did the Police check for this?

The next was: Was the gun -- was a gun found, or retrieved, in the residence, in the car?

If not, where this gun at?

The last question, given at that time, was: The Prosecutor said the defendant shot at the deceased seventeen times, and also how many bullets actually hit, uhm, I think it says, Mr. Brooks' body.

So, I did want to indicate what those questions were.

I want to indicate, once again, why those questions were never asked, uhm, of the witness after that first witness was excused.

Uhm, anything else, for the record, at this time, Ms. Simmons?

MS. SIMMONS: No, Your Honor.

I will make available all of the exhibits, to your staff.

Would you like me to show the password to your Judicial Attorney?

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THE COURT: Uhm --

MS. SIMMONS: For the computer?

THE COURT: Well --

MS. SIMMONS: Or maybe your Deputy?

THE COURT: The Deputy.

Generally, we have the Deputy take the lap top in, in these kinds of circumstances, with the password.

MS. SIMMONS: Certainly.

THE COURT: And I think, I think it was put on the record, but I don't recall, I believe that Mr. Humphrey, you and Ms. Simmons have agreed that the lap top that you're speaking of, uhm, is a clean lap top, with only, uhm, exhibits that were admitted into evidence, such as the 9-1-1 calls, and the video tape.

Uh, am I correct in that regard?

MS. SIMMONS: Yes, Your Honor.

There -- the exhibits are actually on separate disks, and they can be loaded into the blank lap top.

THE COURT: Okay.

MR. HUMPHREY: That's correct, Your Honor.

THE COURT: All right.

Anything else, for the record?

MS. SIMMONS: No, Your Honor.

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THE COURT: Mr. Humphrey?

MR. HUMPHREY: No, Your Honor.

THE COURT: All right.

Uhm, I guess we will just await the jury's return.

DEPUTY: Are we set with the instructions, Judge?

THE COURT: Yes.

DEPUTY: So I can give it to 'em?

THE COURT: Are they down there, maybe?

DEPUTY: Yeah. I just wanted to make sure, before I gave it to 'em.

THE COURT: Is there a verdict form on the inside?

You might want to --

DEPUTY: Yes.

THE COURT: You might want to pull that out, just -- put it on top, so that they know.

Thank you.

(Whereupon the proceedings were concluded for the day at 2:50 p.m.)

- - -

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CERTIFICATION OF COURT REPORTER

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

I, SUZANNE L. KINSEY, Official Court Reporter in and for the Third Circuit Court for the County of Wayne, State of Michigan, do hereby certify that the foregoing pages 1 through 139, inclusive, comprises a full, true and correct rendition, to the best of my ability, of the proceedings and testimony recorded by the Court in the matter of the People of the State of Michigan versus Menayetta Michell Yeager, Case No. 17-08290, on August 15, 2018 (Jury Trial).

Suzanne L. Kinsey

Suzanne L. Kinsey, CSMR 4477
Official Court Reporter

Dated: October 23, 2018

Detroit, Michigan

The authenticity of the foregoing transcript is null and void unless affixed with an ***original*** signature of the Court Reporter in blue ink.

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2019 WL 137323
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Edwardian Dion DAVIDSON, Defendant-Appellant.

No. 336176
|
January 8, 2019

Macomb Circuit Court, LC No. 2016-000684-FC

Before: Gleicher, P.J., and Borrello and Beckering, JJ.

Opinion

Per Curiam.

***1** Defendant, Edwardian Dion Davidson, appeals by right his convictions following a jury trial of first-degree felony murder, MCL 750.316(1)(b), first-degree home invasion, MCL 750.110a(2), two counts of unarmed robbery, MCL 750.530, and one count of theft of a financial transaction device, MCL 750.157n(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to life in prison without parole for the first-degree felony murder conviction. In addition, the trial court sentenced defendant to terms of imprisonment of 26 to 50 years for the first-degree home invasion conviction, 26 to 50 years for each of the two unarmed robbery convictions, and 5 to 15 years for the theft of a financial transaction device conviction. The sole issue on appeal is whether the failure of defendant's trial attorney to request a jury instruction on involuntary manslaughter constituted constitutionally ineffective assistance of counsel. We conclude that it did not.

Defendant's convictions arise out of an unarmed robbery that took place at a condominium in Sterling Heights, Michigan, in November 2015. The 89-year-old victim and his 84-year-old wife had just returned home from an outing and pulled into the garage attached to their condominium. The victim exited the passenger seat and closed the car door. While his wife, who used a cane, was exiting the driver's seat, defendant approached the victim and punched him in the face, causing him to fall to the ground and strike his head. Hearing the noise, the victim's wife turned toward the open garage door and saw defendant walking around the back of the car. She yelled at defendant to get out of her garage, but he did not respond. Defendant grabbed the purse on her shoulder and, after a brief struggle, took it and ran away. The victim sustained a fractured jaw, a fracture to the orbital bone around his eyes, a fracture at the back of his skull, severe swelling and bruising over his left eye, swelling and bruising on his cheeks, and a broken ankle. He remained unconscious and died of his injuries in the hospital eight days after the robbery.

The record shows that defense counsel requested a manslaughter instruction during defendant's trial. [1] It appears that he may have had involuntary manslaughter in mind, as defense counsel argued that there was no evidence that defendant had used a weapon or had intended to cause the decedent's death, and that the decedent may have died from hitting his head on the garage floor. The prosecution opposed giving an instruction on voluntary manslaughter due to the lack of evidence that defendant "acted out of passion or anger brought about by adequate cause," and opposed giving the instruction on involuntary manslaughter because he saw no indication that defendant's negligence caused the victim's death. The trial court asked for a copy of the requested instruction, but defense counsel did not have one. Saying that he had one, the prosecutor handed the trial judge a copy of M Crim. JI 16.9, regarding voluntary manslaughter, but apparently not one for involuntary manslaughter, M Crim. JI 16.10. After reading the proffered instruction into the record, the trial court concluded that the record facts did not support giving the instruction because there was no evidence to support a finding that emotional excitement caused defendant to act from passion instead of judgment or that he acted before he had a chance to calm down. Defendant's counsel gave no indication that this was not the instruction he had requested.

***2** Defendant contends on appeal that the evidence presented at trial supported a jury instruction on involuntary manslaughter, and he argues that his trial attorney rendered constitutionally ineffective assistance with regard to the request. Defendant did not preserve his claim of ineffective assistance of counsel by filing a motion in the trial court for a new trial or a *Ginther*, [2] hearing, or a motion in this Court to remand the matter to the trial court for a *Ginther* hearing. *People v. Payne*, 285 Mich. App. 181, 188; 774 N.W.2d

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714 (2009). Our review of unpreserved claims of ineffective assistance of counsel is "limited to mistakes apparent on the record." *Id.* We review the trial court's findings of fact for clear error and questions of constitutional law de novo. *People v. Dixon-Bey*, 321 Mich. App. 490, 515; 909 N.W.2d 458 (2017).

To establish a claim of ineffective assistance of counsel, a defendant is required to demonstrate "that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v. Trakhtenberg*, 493 Mich. 38, 51; 826 N.W.2d 136 (2012). Defense counsel is presumed to be effective, *People v. Frazier*, 478 Mich. 231, 243; 733 N.W.2d 713 (2007), and "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy," *People v. Riley*, 468 Mich. 135, 140; 659 N.W.2d 611 (2003).

"[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence. *People v. Mendoza*, 468 Mich. 527, 541; 664 N.W.2d 685 (2003). In other words, for defendant to be entitled to an involuntary manslaughter instruction, there must be some evidence in the record to support such instruction. *People v. Heflin*, 434 Mich. 482, 501-503; 456 N.W.2d 10 (1990), citing *People v. Arthur Jones*, 419 Mich. 577, 579-580; 358 N.W.2d 837 (1984) (defendant's girlfriend testified that after the shooting, defendant "just kept mumbling, 'It was an accident. God knows, it was an accident. It just went off.' "); *People v. West*, 408 Mich. 332, 343; 291 N.W.2d 48 (1980) (testimony from defendant that he intentionally aimed shot gun at victim but that its discharge was accidental supported involuntary manslaughter instruction on retrial if requested).

The record evidence does not support defendant's claim that he was entitled to an instruction on involuntary manslaughter. Defendant's theory of defense was that he could not have committed the charged crimes because he was elsewhere at the time. Prosecution witness Adriann Pypkowski testified that she spoke to defendant by cell phone on the date of the incident, and although she did not know where he was when they spoke, she knew he had gone to Flint that day. Defendant bolstered that alibi with four witnesses of his own, all of whom testified that he went to Flint on the day of the charged crimes. Defendant argues in his brief to this Court that involuntary manslaughter was the "backup defense," but does not cite to any evidence in the record that would support giving an instruction on involuntary manslaughter. Absent any evidence in the record to support an involuntary manslaughter instruction, defendant's claim that he was entitled to such instruction and that his trial counsel rendered ineffective assistance by failing adequately to request one must fail. *Heflin*, 434 Mich. at 501-503.

Equally unavailing is defendant's contention that an instruction on involuntary manslaughter was warranted because there was no evidence that he acted with malice when he punched the victim. Malice is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v. Bergman*, 312 Mich. App. 471, 487; 879 N.W.2d 278 (2015). "A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v. Carines*, 460 Mich. 750, 759; 597 N.W.2d 130 (1999).

***3** The evidence showed that defendant punched the victim with such force that he fractured the victim's jaw and orbital bone and caused him to fall and strike his head on the garage floor, fracturing his skull. In addition, it was posited at trial that defendant may have kicked the victim or stepped on his leg and shattered the victim's ankle while attempting to move around the car toward the victim's wife. A rational trier of fact could infer from the brutality of defendant's actions that he intended to cause great bodily harm, or at the very least, acted in wanton and willful disregard that such harm would result from his actions. See *Bergman*, 312 Mich. App. at 487.

Even if a rational view of the evidence would have supported instructing the jury regarding involuntary manslaughter, defendant still cannot overcome the presumption that defense counsel's decision not to pursue a jury instruction on involuntary manslaughter was sound trial strategy. Defense counsel's trial strategy did not focus on whether defendant acted with malice when he injured the victim. Instead, defense counsel argued that defendant was not properly identified as the perpetrator of the crime, and he provided several alibi witnesses to support this contention. Decisions regarding which jury instructions to request are generally considered part of trial strategy, and this Court will not second-guess

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defense counsel's trial strategy "with the benefit of hindsight." *People v. Dunigan*, 299 Mich. App. 579, 584, 590; 831 N.W.2d 243 (2013). Although it is clear that defense counsel's mistaken-identity argument amounted to an "all-or-nothing" defense, the decision to proceed with an all-or-nothing defense is a legitimate trial strategy. *People v. Bennett*, 290 Mich. App. 465, 499; 802 N.W.2d 627 (2010). "The fact that defense counsel's strategy was unsuccessful does not render him ineffective." *People v. Solloway*, 316 Mich. App. 174, 190; 891 N.W.2d 255 (2016).

Furthermore, defendant cannot properly demonstrate that he was prejudiced by defense counsel's failure to pursue a jury instruction on involuntary manslaughter. The jury was given instructions on first-degree felony murder and the lesser included offense of second-degree murder. See *People v. Carter*, 395 Mich. 434, 438-439; 236 N.W.2d 500 (1975) (indicating that second-degree murder is a lesser included offense of first-degree felony murder). Although the jury was presented with the option of convicting defendant of second-degree murder, it chose to convict him of first-degree felony murder instead. Because the jury rejected the opportunity to convict defendant of the lesser included offense of second-degree murder, it is unlikely that it would have chosen to convict him of involuntary manslaughter. See *People v. Raper*, 222 Mich. App. 475, 483; 563 N.W.2d 709 (1997) ("The jury's rejection of second-degree murder in favor of first-degree murder reflect[s] an unwillingness to convict on a lesser included offense such as manslaughter."). Thus, defendant is unable to show that there is a reasonable probability that, if not for defense counsel's failure to request the jury instruction on involuntary manslaughter, the jury would have convicted him of the lesser offense of involuntary manslaughter instead of first-degree felony murder. Therefore, defendant was not prejudiced by defense counsel's failure to request a jury instruction on involuntary manslaughter.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 137323

Footnotes

1 Manslaughter, which is murder without malice, is a necessarily included lesser offense of murder. *People v. Mendoza*, 468 Mich. 527, 533-534; 664 N.W.2d 685 (2003) "The common law recognizes two forms of manslaughter: voluntary and involuntary." *Id.* "A defendant properly convicted of voluntary manslaughter is a person who acted out of a temporary excitement induced by an adequate provocation and not from the deliberation and reflection that marks the crime of murder." *People v. Townes*, 391 Mich. 578, 590; 218 N.W.2d 136 (1974). Involuntary manslaughter is a catch-all crime that encompasses all homicides that do not constitute murder, voluntary manslaughter, or a justified or excused homicide." *People v. Head*, 323 Mich. App. 526, 532; 917 N.W.2d 752 (2018).

2 *People v. Ginther*, 390 Mich. 436; 212 N.W.2d 922 (1973).

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2012 WL 1314138
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Lorenzo DAVIS, Defendant–Appellant.

Docket No. 302401.
|
April 17, 2012.

Wayne Circuit Court; LC No. 07–006937–FC.

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

Opinion

PER CURIAM.

***1** Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316, and sentenced to life in prison without the possibility of parole. Following his conviction, defendant filed a motion for a new trial arguing that he did not receive effective assistance of counsel. After a *Ginther*[1] hearing, the trial court denied the motion. We affirm.

Defendant and the decedent, Alwin May, lived in the same boarding house and got into an argument over the volume of the living room television. The decedent eventually punched defendant in the face hard enough to break the skin. The decedent resumed lying on the floor in front of the television and defendant went and sat on the stairs. Defendant stayed on the stairs for approximately 15 minutes. He then went into the kitchen, snatched a knife out of another resident's hand, returned to where decedent was lying down, stooped down and stabbed the decedent in the chest, killing him.

The jury was properly instructed on first degree premeditated murder and second degree murder and convicted defendant of the first degree charge. Defendant argues that he was denied the effective assistance of counsel by defense counsel's failure to request a jury instruction for voluntary manslaughter. During the *Ginther* hearing, defense counsel testified that he did not think the circumstances of this incident allowed for a voluntary manslaughter instruction. The trial court, however, concluded that it would have given the voluntary manslaughter instruction had defense counsel requested it. Given this, the trial court found that defense counsel's representation of defendant "slightly f[e]ll beneath the reasonableness standard." Nevertheless, the court denied the motion for new trial, concluding that the jury's decision to convict defendant of first degree premeditated murder rather than second degree murder necessitated that the jury made a finding of premeditation and deliberation that would have prevented a conviction of voluntary manslaughter.

We agree with the trial court's reasoning. "[A] jury's rejection of second-degree murder in favor of first-degree murder reflect[s] an unwillingness to convict on a lesser included offense such as manslaughter," and therefore, counsel's failure to request a manslaughter instruction did not cause prejudice. *People v. Raper,* 222 Mich.App 475, 483–484; 563 NW2d 709 (1997).

Defendant also argues that defense counsel was ineffective for presenting the defense of voluntary intoxication to the jurors because such a defense is not, in fact, recognized under Michigan law. During closing argument defense counsel stated the following:

> The prosecutor claims, and he has argued, that the state of mind was one of an[ ] intent to murder, of an[ ] intent to kill. If they can't prove that than you must not, you may not, convict of Murder In The First Degree. But the law makes provision for this and the law will provide for the judge to give you the reduced or lesser offense of Second Degree Murder. If you do not believe that Mr. Davis entertained the premeditated intent to kill than you can't find him guilty of Murder In The First Degree. But, again, [sic] invite you to listen carefully to the Judge, because he is the source of the law that you will have to apply in this case.
>
> ***2** The main thing I want to stress here is Michael Berry's testimony. I found Mr. Berry to be a very good witness. He gave a rather detailed narrative of the facts and he also made an observation about Mr. Davis which I found very interesting. He said that normally, Mr. Davis, is a[sic] affable, easy going guy. Not argumentative, doesn't pick fights. He's normally a nice guy, quiet, minds his own business. But, when he drinks, when he drinks, his personality changes completely. He becomes

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> argumentative. He becomes pugnacious. [sic] Wants to fight. [sic] Completely different state of mind.
>
> And, Mr. Berry, knows Mr. Davis and he's seen him before like that. So, he knows the difference between Mr. Davis drunk and Mr. Davis sober. Apparently, that difference is erractical [sic]. The fact of the drunkenness is admitted by the prosecution, but the [sic] Officer Kozlowski, the officer who has been a police officer for 18 years. He testified that the defendant was more than a little drunk. He was soused.
>
> Again, this added to his—the change in his personality, the change in his demeanor. I think that when you've considered all of the facts in this case and when you've considered the law that the judge will give you in a few minutes. I think you will be unable to find that my client entertained the requisite state of mind. That is a premeditated intent to kill....

Defendant is correct that voluntary intoxication is not a defense. MCL 768.37 provides, in relevant part:

> (1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

The trial court recognized this and properly informed the jurors that "[i]t is not a defense that the defendant was under [ ] or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, controlled substance or a combination of them pertinent to Homicide Murder, First Degree, Premeditated, and, or Second Degree, Murder." Defense counsel did not object to that instruction.

Counsel testified during the *Ginther* hearing that he was aware that the law had abolished voluntary intoxication as a defense and that defendant's intoxication could only result in an acquittal if the jury accepted it as a defense even though it was instructed to the contrary. He testified that he viewed this as a "Hail Mary" defense, but that he did not believe a better defense was available, and he thought the argument might lead the jury to conclude that defendant did not have the requisite state of mind for first-degree murder regardless of the instruction. As noted above, defendant argues that his best defense would have been to argue provocation and request a voluntary manslaughter instruction. This may have been so, but as noted above, we agree with the trial court that this would not have led to a different outcome given the overwhelming evidence in the case, the nature of the alleged provocation and the time between the provocation and the killing. We do not believe that a reasonable jury after hearing the evidence in this case, could conclude (a) that the provocation would have caused a reasonable person to lose control; and (b) that there was no lapse of time during which a reasonable person would have controlled his passions. *People v. Roper,* 286 Mich.App 77, 87; 777 NW2d 483 (2009). While defendant criticizes counsel for seeking a verdict based on nullification, the argument suggested by defendant would have similarly required jury nullification to be successful.

***3** Lastly, defendant argues that counsel was deficient for failing to establish that the decedent was under the influence of narcotics, which could have been shown to have contributed to defendant's provocation. Defense counsel did not question Assistant Wayne County Medical Examiner Leigh Hlavaty regarding the presence of drugs in the decedent's body. Defense counsel was aware that the decedent's toxicology report reflected the presence of narcotics, but did not think this fact was helpful to defendant's case. Defense counsel's choice not to question Hlavaty regarding the presence of narcotics in the decedent's system was a matter of reasonable trial strategy. *Rockey,* 237 Mich.App at 76–77. We will not substitute our judgment for that of counsel regarding matters of trial strategy. *Payne,* 285 Mich.App at 190. Therefore, defendant has failed to demonstrate that he was denied the effective assistance of counsel.

Affirmed.

All Citations

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Footnotes

1 *People v. Ginther,* 390 Mich. 436; 212 NW2d 922 (1973).

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2009 WL 348842
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Sylvester Steven KEYS, Defendant-Appellant.

Docekt No. 277649.
|
Feb. 12, 2009.

West KeySummary

1 **Criminal Law** For Consultation of Counsel or Preparation of Defense

The court did not abuse its discretion in denying a defendant's motion to adjourn his trial for premeditated murder. Counsel had been visiting with the defendant in jail and had appeared at the defendant's proceeding the prior week, before prior counsel withdrew. Counsel had indicated to the judge that he was prepared to proceed with trial. MCR 2.503(B)(1).

Wayne Circuit Court; LC No. 06-014069-01.

Before: WILDER, P.J., and CAVANAGH and MURRAY, JJ.

Opinion

PER CURIAM.

***1** Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for his first-degree murder conviction, one to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. Defendant appeals his first-degree murder conviction as of right. We affirm.

Defendant first argues that the trial judge and presiding judge of the criminal division reversibly erred when they denied defense counsel's request for an adjournment, thereby denying him an opportunity to adequately prepare for trial, and in turn, denying him his constitutional right to the effective assistance of counsel. We disagree. We review a trial court's decision on whether to grant an adjournment for an abuse of discretion. *People v. Akins,* 259 Mich.App. 545, 556, 675 N.W.2d 863 (2003). "[A]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *People v. Carnicom,* 272 Mich.App. 614, 617, 727 N.W.2d 399 (2006) (quotation and citation omitted).

To invoke the trial court's discretion to grant an adjournment, a defendant must show both good cause and due diligence. MCR 2.503(B)(1); *People v. Coy,* 258 Mich.App. 1, 18, 669 N.W.2d 831 (2003). Even if good cause and due diligence are shown, a trial court's erroneous denial of a request for an adjournment is not grounds for reversal unless the defendant demonstrates prejudice as a result of the erroneous denial. *Id.* at 18-19, 669 N.W.2d 831. When reviewing a court's denial of a defendant's motion for an adjournment, a reviewing court considers:

> (1) [W]hether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v. Echavarria,* 233 Mich.App. 356, 369, 592 N.W.2d 737 (1999).]

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In determining whether the denial prejudiced an accused, a court must balance the benefits of granting the adjournment against the public's interest in the prompt and efficient administration of justice. *Akins, supra* at 557, 675 N.W.2d 863.

After filing an appearance on the record, but prior to being substituted as counsel and moving for an adjournment, defense counsel told the trial judge that if prior trial counsel (Robert Elsey) filed a motion for an adjournment that was denied, defense counsel was still "ready to go and we can pick a jury." After Elsey informed the trial judge that defense counsel had been (1) visiting with defendant in jail, (2) had appeared with defendant at a proceeding the prior week, (3) had been advising defendant, and (4) had been talking to witnesses, who as a result would no longer talk to Elsey, Elsey moved to withdraw as counsel. After the trial judge acknowledged that defense counsel had been in court the previous week at defendant's proceedings, the court granted the substitution of counsel because defense counsel indicated that he was "ready to proceed with the case." Defense counsel then immediately requested that he be allowed to "go before the presiding judge" to request an adjournment "to protect the defendant." Defense counsel's request was granted, and while appearing before the presiding judge, defense counsel indicated that he had been in contact with defendant for the past six days and that, although trial was scheduled to begin "today," he was "ready to go." The presiding judge denied defense counsel's motion, indicating that pursuant to an administrative order he did not have the authority to grant an adjournment, as his power was limited to reviewing prosecutor requests to review orders granting adjournments. [1]

***2** The trial court did not abuse its discretion. The record shows that defense counsel (1) had been working with defendant for at least six days, (2) had already appeared at court proceedings with defendant, and (3) had indicated to the trial judge and the presiding judge that he was prepared to proceed with trial. Furthermore, defense counsel sufficiently addressed multiple preliminary matters immediately after the motion for an adjournment was denied, and subsequently rigorously cross-examined the prosecution's witnesses regarding inconsistencies between their trial testimony and prior written statements and preliminary examination testimony. Consequently, defendant neither showed good cause for the adjournment nor that he was prejudiced by the denial. *People v. Frazier,* 478 Mich. 231, 243 n. 10, 733 N.W.2d 713 (2007). Therefore, neither the trial judge nor the presiding judge abused his respective discretion when denying defendant's motion to adjourn, and the denial of the adjournment did not deny defendant his constitutional right to the effective assistance of counsel. *Akins, supra* at 556-557, 675 N.W.2d 863; *Coy, supra* at 17-19, 669 N.W.2d 831. [2]

Defendant also argues that the trial court committed error requiring reversal when it failed to give a requested instruction on involuntary manslaughter. We disagree. We review for an abuse of discretion a trial court's determination whether a jury instruction was applicable to the facts of the case. *People v. Hawthorne,* 265 Mich.App. 47, 50, 692 N.W.2d 879 (2005), rev'd on other grounds 474 Mich. 1108, 711 N.W.2d 741 (2006). However, whether an offense is a lesser-included offense is a question of law, which we review de novo. *People v. Mendoza,* 468 Mich. 527, 531, 664 N.W.2d 685 (2003). Finally, a jury's conviction of a defendant for first-degree murder when also instructed on the lesser included offense of second-degree murder reflects an unwillingness to convict on another lesser included offense, and thus the failure to instruct on further lesser included offenses, like manslaughter, is harmless. *People v. Raper,* 222 Mich.App. 475, 483, 563 N.W.2d 709 (1997).

Here, the jury convicted defendant of first-degree murder, despite also being instructed on second-degree murder. Thus, even if we assume instructional error occurred, it would have been harmless error and would not merit reversal. *Id.* [3]

We also reject defendant's argument that his trial counsel's performance was so deficient that it denied defendant his constitutional right to the effective assistance of counsel. When reviewing a claim of ineffective assistance of counsel when an evidentiary hearing is not previously held, we conduct a de novo review of the existing record. *People v. LeBlanc,* 465 Mich. 575, 579, 640 N.W.2d 246 (2002); *People v. Rodriguez,* 251 Mich.App. 10, 38, 650 N.W.2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v. Toma,* 462 Mich. 281, 302-303, 613 N.W.2d 694 (2000).

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Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v. Dixon,* 263 Mich.App. 393, 398, 688 N.W.2d 308 (2004). Counsel does not render ineffective assistance by failing to raise futile objections. *People v. Ackerman,* 257 Mich.App. 434, 455, 669 N.W.2d 818 (2003).

***3** Defense counsel was not ineffective for failing to object to the trial court's aiding and abetting instruction. To prove aiding and abetting of a crime, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person; (2) that the defendant performed acts or gave encouragement which assisted in the commission of the crime; and (3) that the defendant intended the commission of the crime or had knowledge of the other's intent at the time he gave the aid or encouragement. *People v. Moore,* 470 Mich. 56, 67, 679 N.W.2d 41 (2004).

In relevant part, the trial court's aiding and abetting instruction stated that in order to convict defendant as an aider and abettor, the jury had to find that someone committed the charged crime, that defendant assisted in the commission of the crime, and that at the time defendant gave assistance "he intended to help someone else commit the crime." Because one cannot intend to help someone else commit murder (the crime), unless one intends to commit murder (the crime) or at the very least know that the person you are helping intends to commit murder (the crime), the trial court's instructions imply that defendant could only be found guilty under an aiding and abetting theory if he intended to commit murder or knew that the person he assisted intended to commit murder. Therefore, the trial court properly instructed the jury on what it must find in order for it to convict defendant under an aiding and abetting theory. *Moore, supra* at 67, 679 N.W.2d 41; *Hawthorne, supra* at 51, 57, 692 N.W.2d 879. Any objection to the trial court's aiding and abetting instruction would have been futile, so counsel did not render ineffective assistance by failing to make such an objection. *Ackerman, supra* at 455, 669 N.W.2d 818.

We also reject defendant's argument that defense counsel was ineffective for failing to object to the trial court's first- and second-degree murder instructions, which failed to instruct the jury that the prosecution must establish that "the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime." The commentary to CJI2d 16.1 (first-degree premeditated murder) and CJI2d 16.5 (second-degree murder) provide that although the instruction can be read after the respective murder instructions, it is "more commonly given at a later time."

After the trial court instructed the jury on the elements of first- and second-degree murder, and before it instructed the jury on voluntary manslaughter, it instructed the jury that the prosecution must establish "that the defendant caused the death without lawful excuse or justification." The trial court's instructions, taken as whole, properly instructed the jury on the elements of first-and second-degree murder. See CJI2d 16.1 and CJI2d 16.5. Accordingly, the trial court's first- and second-degree murder instructions were not erroneous. *Hawthorne, supra* at 51, 692 N.W.2d 879. Any objection to the instructions would have been futile, and thus counsel did not render ineffective assistance by failing to make such an objection. *Ackerman, supra* at 455, 669 N.W.2d 818. [4]

***4** We additionally reject defendant's argument that defense counsel was ineffective for failing to cross-examine Antoine Shaw with his preliminary examination testimony that he did not see defendant with a gun on the night of the shooting. At trial, Shaw testified that he never saw defendant with a gun on the night of the shooting. In response to Shaw's trial testimony, the prosecution impeached Shaw by introducing his statement to the police that he saw defendant run out of his house and start shooting. Although Shaw admitted that he told the police that he saw defendant fire a gun on the night of the shooting, he testified that he only told the police that because he was confused and was trying to get the police out of his house.

Given that Shaw testified that he did not see defendant with a gun on the night of the shooting, Shaw's preliminary examination testimony to the same effect would have been merely cumulative. Furthermore, although introduction of the testimony may have bolstered Shaw's trial testimony, it still would not have changed the fact that Shaw told the police that he saw defendant fire a gun on the night of the shooting. Finally, Shaw provided a reason why his trial testimony was different from what he told the police. Defendant has therefore failed to establish that defense counsel's failure to cross-examine Shaw with his preliminary examination testimony fell below an objective standard of reasonableness, or that doing so would have affected the outcome of the proceedings. Accordingly, trial counsel was not ineffective. *Toma, supra* at 302-303, 613 N.W.2d 694.

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Additionally, because (1) eyewitnesses saw defendant in the proximate area of the shooting immediately after gunshots were heard, and one witness even told the police that he saw defendant fire a gun, and (2) defendant has failed to establish who could have provided alibi testimony, defense counsel's failure to present an alibi defense did not fall below an objective standard of reasonableness. Nor was presenting a self-defense theory plausible since (1) no evidence was presented that would suggest that defendant acted in self-defense, and (2) defendant failed to establish what evidence could have been presented that would have suggested that defendant acted in self-defense. We therefore conclude that defense counsel likewise did not provide ineffective assistance when he failed to present either an alibi defense or self-defense theory. *Id.*

Defendant's final argument is that the trial court erred when it precluded defendant from presenting evidence regarding the victim's reputation for violence. Once again we disagree. Generally we review a trial court's evidentiary decisions for an abuse of discretion. *People v. Katt,* 468 Mich. 272, 278, 662 N.W.2d 12 (2003). However, when a trial court's decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes the admission of evidence, we review a trial court's decision under a de novo standard of review. *Id.* Thus, when preliminary questions of law are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

***5** The relevance of a victim's aggressive character depends on whether it is used as proof of an essential element of a charge, claim, or defense, or whether it falls within an exception to MRE 404(a)'s propensity rule. *People v. Harris,* 458 Mich. 310, 315-317, 583 N.W.2d 680 (1998). MRE 404(a)(2) creates an exception for the admission of circumstantial character evidence of the victim only "[w]hen self-defense is an issue in a charge of homicide[.]"

Although defense counsel stated that the prosecution failed to establish that the crime occurred "under circumstances that are not excused or justified" because nobody knew "what happened," defendant never presented a theory of self-defense. A defendant can be found to have acted in self-defense "if, under all the circumstances, he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *People v. Riddle,* 467 Mich. 116, 119, 649 N.W.2d 30 (2002).

Here, the record establishes that during the verbal altercation between the victim and defendant, the victim stated that he was going to call people from the east side to presumably help the victim fight defendant. However, no evidence was presented that the victim actually called anyone from the east side. In fact, the evidence presented established that shortly before the victim was shot, he and his girlfriend returned home unaccompanied by anyone else. Furthermore, although the record establishes that the victim asked his brother for a gun, no evidence was presented that defendant was aware of the fact. And, even though Shaw testified that he saw the victim with "something" in his hand shortly before the incident, no gun was found on the victim's person after he was shot, no one ever saw the victim with a gun, and the victim told his brother that he was unable to procure a gun. Hence, no evidence was presented to establish that at the time the victim was murdered, defendant could have honestly and reasonably believed that he was in imminent danger of death or great bodily harm and that it was necessary for him to exercise deadly force. Therefore, the MRE 404(a)(2) exception does not apply. *Id.* Thus, the trial court did not abuse its discretion when it precluded testimony pertaining to the victim's character. MRE 404(a)(2); *Harris, supra* at 317, 583 N.W.2d 680.

Affirmed.

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Footnotes

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1 Third Judicial Circuit Court Rule 6.100(C) provides that only the presiding judge of the criminal division can adjourn a trial:

> No trial of a criminal case shall be adjourned except by the presiding judge for good cause shown upon motion of the party seeking the adjournment or by the presiding judge for good cause.

2 Even though the presiding judge denied defendant's motion to adjourn on the erroneous ground that he did not have authority to grant an adjournment, see Third Circuit Rule 6.100(C), *supra,* because the denial of the adjournment was not improper, we nonetheless affirm the presiding judge's decision. See *People v. Ramsdell,* 230 Mich.App. 386, 406, 585 N.W.2d 1 (1998) (holding that this Court does "not reverse where the trial court reaches the right result for a wrong reason.").

3 Because defense counsel expressed satisfaction with the jury instructions that were given, we also conclude that defendant has waived his arguments regarding the trial court's aiding and abetting instruction, and the trial court's first- and second-degree murder instructions. See *People v. Hall (On Remand),* 256 Mich.App. 674, 679, 671 N.W.2d 545 (2003).

4 We likewise reject defendant's argument that defense counsel was ineffective for failing to object to the trial court's failure to give an involuntary manslaughter instruction. Even if such an instruction was warranted, since defense counsel requested the instruction, his performance could not have fallen below an objective standard of reasonableness. Accordingly, defense counsel's performance was not ineffective. *Toma, supra* at 302-303, 613 N.W.2d 694.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Donald Glenn LASLEY, Defendant–Appellant.

Docket No. 322969.
|
Dec. 10, 2015.

Ionia Circuit Court; LC No.2013–015854–FC.

Before: OWENS, P.J., and MURPHY and HOEKSTRA, JJ.

Opinion

PER CURIAM.

***1** Defendant Donald Glenn Lasley was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment without the possibility of parole with respect to the murder conviction and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his right to present a defense when the trial court precluded him from introducing expert testimony on "battered person syndrome" [1] and witnesses who could support a finding that defendant was previously abused by the victim. The trial court denied admission of the evidence on the determination that a pretrial notice of self-defense had not been filed by defendant, effectively rendering the evidence irrelevant. We initially note that there is no statutory or court-rule requirement that a defendant file a pretrial notice regarding a claim of self-defense. See MCL 780.971 *et seq.* (Self–Defense Act); MCR 6.001 *et seq.* But the trial court's ruling also reflected an accurate recognition that battered person syndrome is generally connected to a self-defense theory.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v. Dobek,* 274 Mich.App 58, 93; 732 NW2d 546 (2007). An abuse of discretion occurs when the trial court's decision "falls outside the range of reasonable and principled outcomes." *People v. Unger,* 278 Mich.App 210, 217; 749 NW2d 272 (2008). Any preliminary questions of law, e.g., whether a rule of evidence or statute precludes the admissibility of evidence, are reviewed de novo, bearing in mind that a court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *People v. Lukity,* 460 Mich. 484, 488; 596 NW2d 607 (1999).

A criminal defendant has a right to present a defense under the state and federal constitutions. *People v. Kurr,* 253 Mich.App 317, 326; 654 NW2d 651 (2002). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right[,][and][t]he accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence ." *People v. Hayes,* 421 Mich. 271, 279; 364 NW2d 635 (1984) (citation and quotation marks omitted). The admissibility of expert testimony is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

***2** "A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both

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relevant and reliable." *People v. Kowalski,* 492 Mich. 106, 120; 821 NW2d 14 (2012). In *Kowalski,* our Supreme Court stated:

> In *People v. Christel,*[449 Mich. 578, 592; 537 NW2d 194 (1995),] we observed that expert testimony is needed when a witness's actions or responses are incomprehensible to average people. Thus, we permitted a prosecution expert to testify about battered woman syndrome and how a victim of domestic violence might deny, repress, or minimize the abuse. We held that this type of testimony was relevant and helpful when needed to explain a complainant's actions.
>
> The common theme in these cases is that certain groups of people are known to exhibit types of behavior that are contrary to common sense and are not within the average person's understanding of human behavior. In these instances, an expert's specialized testimony may enlighten the jury so that it can intelligently evaluate an experience that is otherwise foreign. [*Kowalski,* 492 Mich. at 124 (citations, quotation marks, alteration brackets, and ellipses omitted).]

As part of the battered person syndrome, the abused person lives in constant fear, coupled with a perceived inability to escape a continuing cycle of abuse, eventually resulting in a belief that the only options are to endure the abuse, to strike back, or to commit suicide. *People v. Wilson,* 194 Mich.App 599, 603; 487 NW2d 822 (1992).

"In most cases, the battered woman syndrome is offered by the defendant in a case of homicide in which the defendant is claiming self-defense." *Christel,* 449 Mich. at 589. In the context of self-defense, testimony regarding the syndrome has been used to show how a battered person reacts to the batterer, to explain the reasonableness of the battered person's perception that danger or great bodily harm is imminent, and to rebut a prosecutor's assertion that the defendant could have left rather than kill the batterer. *Wilson,* 194 Mich.App at 604. Defendant correctly asserts that expert testimony on battered person syndrome is not limited to self-defense claims. As touched on above, in *Christel,* 449 Mich. at 589, our Supreme Court acknowledged the "minority of situations in which the evidence is offered to help evaluate the credibility of the complainant instead of exculpating the accused." Under those circumstances, expert testimony "is relevant and helpful ... to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse." *Id.* at 580.

Here, we conclude that the proposed expert testimony on battered person syndrome was not related to a claim of self-defense, nor relevant to evaluating credibility. Defendant never raised a claim of self-defense, arguing instead, as reflected in closing argument, that "[t]his was an accidental shooting," and that "[h]e never intended to kill his daughter." Defendant himself testified that, while the victim had made a move for the shotgun that defendant had retrieved and threatened to shoot defendant if she got hold of the gun, the discharge that killed his daughter was ultimately accidental, occurring when he jerked the gun back. Also, defendant's statements to the 911 operator and his confession to the lead detective indicated that he shot his daughter after she had verbally abused him, absent any threatening actions by the victim, which shooting was the culmination of seven years of intolerable behavior by defendant's daughter, with defendant reaching his breaking point. His confession did not evidence in any manner self-defense. A defendant claiming self-defense "implies his actions were intentional but that the circumstances justified his actions." *Wilson,* 194 Mich. at 602. Thus, expert testimony on battered person syndrome was unnecessary relative to a self-defense claim, as there was no assertion or evidence that the shooting was committed in self-defense. Moreover, expert testimony on battered person syndrome was not sought to be introduced to assist the jury in assessing the credibility of the victim or defendant.

***3** To the extent that defendant now argues on appeal that expert testimony on battered person syndrome was relevant to defendant's credibility, we fail to see any significant connection between the syndrome and defendant's accident theory such that his credibility would have been meaningfully bolstered by the testimony. Indeed, expert testimony on battered person syndrome, along with the supporting evidence of abuse, would likely have bolstered the prosecution's case, considering that such testimony and evidence would have been consistent with defendant's confession to police. Defendant also argues that had the trial court not excluded the expert testimony and purported evidence of abuse prior to trial, defendant could have pursued self-defense at trial as an alternative defense theory. However, at the pretrial hearing that covered the issues concerning battered person syndrome and whether to instruct on voluntary manslaughter, defense counsel stated that self-defense was not being pursued and

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that battered person syndrome was going to serve as a basis to negate the intent to kill, as we discuss below. Further, we fail to see how defendant could have possibly testified to both accident and an intentional shooting done in self-defense.

Defendant argues that expert testimony on battered person syndrome was crucial to the defense theory that defendant did not possess the requisite state of mind to commit murder, and that, at most, defendant committed voluntary manslaughter. Thus, defendant offers that the proposed testimony was relevant to help negate his intent. However, defendant offers no legal authority supporting the proposition that evidence on battered person syndrome is relevant in this regard. As discussed in *Wilson,* 194 Mich.App at 603, battered person syndrome speaks to situations in which an individual comes to believe that his or her only options are to endure the abuse, strike back, or commit suicide. Defendant fails to explain in any meaningful and convincing manner how battered person syndrome would prevent a person from forming the intent to kill or from acting with premeditation or deliberation.[2] Rather, testimony on battered person syndrome is admitted for the purpose of demonstrating that the battered person was *justified* in killing his or her batterer, given the perception that danger or great bodily harm was imminent. *Id.* at 602. Furthermore, defendant's accident theory already provided a basis for defendant to argue that he lacked the intent to kill his daughter.

Defendant's argument also suggests that battered person syndrome, along with the proffered evidence of abuse, were relevant to the offense of voluntary manslaughter. "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v. Mendoza,* 468 Mich. 527, 535–536; 664 NW2d 685 (2003). Insulting words, as opposed to words of an informative nature, generally do not constitute adequate provocation. *People v. Pouncey,* 437 Mich. 382, 391; 471 NW2d 346 (1991).[3] We find it unnecessary to ascertain whether battered person syndrome and the alleged supporting evidence may have been relevant to the crime of voluntary manslaughter and the question whether defendant acted in the heat of passion as caused by adequate provocation. We also find it unnecessary to determine whether the evidence in general supported a voluntary manslaughter instruction. Defendant waived the issue when his counsel stated at trial that, in light of the evidence, a voluntary manslaughter instruction would not be appropriate and that he was satisfied with instructions solely on first-and second-degree murder. See *People v. Carter,* 462 Mich. 206, 215; 612 NW2d 144 (2000) (waiver is the intentional relinquishment or abandonment of a known right). A defendant is not allowed to waive objection to an issue at trial and then claim error on appeal. *People v. Fetterley,* 229 Mich.App 511, 520; 583 NW2d 199 (1998). Defendant has not raised any associated claim of ineffective assistance of counsel. Further, defendant cannot establish the necessary prejudice in order to avoid the harmless error rule, given that the jury convicted him of first-degree murder and rejected a second-degree murder conviction. See *People v. Raper,* 222 Mich.App 475, 483–484; 563 NW2d 709 (1997).[4]

***4** Defendant contends, however, as he did in the context of self-defense, that had the trial court, prior to trial, not excluded expert testimony on battered person syndrome and the testimony of witnesses who were supposedly prepared to testify to abuse, there would have been sufficient evidence to support a voluntary manslaughter instruction and the jury may have seriously considered a lesser charge.[5] First, when defendant argued before trial in favor of admitting the evidence at issue, he focused exclusively on the now-rejected argument that it negated the element of intent; defendant did not argue that the evidence should be admitted to advance a voluntary manslaughter theory. Additionally, assuming the relevancy of the evidence, as bearing on whether defendant acted in the heat of passion upon adequate provocation, it is difficult if not impossible to reconcile an intentional killing predicated on manslaughter with defendant's testimony that the shooting was an accident. Although the evidence would have been consistent with defendant's description of what occurred as conveyed to the police in his confession, we conclude that reversal is unwarranted, because defendant has not established prejudice, where he has not argued, let alone shown, that the evidence was sufficient to overcome the general rule that insulting words do not constitute adequate provocation. In sum, reversal is unwarranted with respect to defendant's arguments regarding battered person syndrome, the associated evidence of abuse, and voluntary manslaughter.

Next, defendant argues that his Fifth Amendment rights were violated when the interrogating detective did not "scrupulously honor" his purported invocation of the right to silence. As a result, defendant argues that the trial court erred

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by admitting a recorded interview containing his statements that were made after he asserted his right to remain silent. Defendant, however, waived this claim by stipulating on the record to the admission of the entire recorded interview into evidence. *Carter,* 462 Mich. at 215–216. Defendant bootstraps a claim of ineffective assistance of counsel. Even assuming—without deciding—that defendant unequivocally asserted his right to remain silent and that it was not "scrupulously honored" by the detective, see *People v. Henry (After Remand),* 305 Mich.App 127, 145; 854 NW2d 114 (2014), he cannot establish the requisite prejudice, assuming counsel's performance was deficient, *People v. Carbin,* 463 Mich. 590, 599–600; 623 NW2d 884 (2001). Before defendant presumably asserted his right to remain silent in the recorded interview, he provided a very lengthy and detailed description of the victim's killing, including the fact that he retrieved a shotgun from his bedroom, removed the lock, loaded the gun, and shot the victim. The latter part of the interview was no more inculpatory than these admissions. Given that this evidence was properly before the jury, defendant cannot establish that admission of the full interview prejudiced him.

***5** Affirmed.

All Citations

Not Reported in N.W.2d, 2015 WL 8538923

Footnotes

1 Earlier cases from this Court and our Supreme Court discussed what has been termed "battered wife syndrome," "battered woman syndrome," or "battered spouse syndrome." See, e.g., *People v. Christel,* 449 Mich. 578, 580; 537 NW2d 194 (1995); *People v. Wilson,* 194 Mich.App 599, 600–603; 487 NW2d 822 (1992). We shall use the more generic term "battered person syndrome" throughout this opinion, given that the adult victim and alleged perpetrator of the abuse was defendant's daughter.

2 Defendant's argument poses a comparison to the defunct defense of diminished capacity. Since 1975, the insanity defense has been governed by statute. *People v. Carpenter,* 464 Mich. 223, 230; 627 NW2d 276 (2001), citing 1975 PA 180. In *Carpenter,* the Supreme Court held that the Legislature created "an all or nothing insanity defense" and that "evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility *by negating specific intent.*" *Id.* at 237 (emphasis added). *Carpenter* explicitly rejected the continuing viability of a "diminished capacity" defense. *Id.* at 235–236.

3 According to defendant's statement to the police, the shooting was triggered by insulting words communicated by the victim to defendant, although couched in a history of abuse.

4 In *Raper,* 222 Mich.App at 483–484, this Court explained:

> In this case, defendant was charged with first-degree murder. The jury was instructed on first-degree murder and second-degree murder, and found defendant guilty of first-degree murder. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter. Thus, even if defendant's trial counsel had requested a manslaughter instruction and the trial court had failed to give such an instruction, such error would have been harmless. For the same reason, defendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice. [Citation omitted.]

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5 Implicit in defendant's argument is that nothing can be made of the fact that the jury failed to convict him of second-degree murder, given that the jury did not have the benefit of hearing testimony on battered person syndrome and, perhaps more importantly, hearing extensive testimony of the abuse itself.

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2017 WL 2263100
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Joseph James PAGAN, Defendant–Appellant.

No. 325558
|
May 23, 2017

Macomb Circuit Court, LC No. 2014–002252–FC

Before: Riordan, P.J., and Ronayne Krause and Swartzle, JJ.

Opinion

Per Curiam.

***1** Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316, and first-degree criminal sexual conduct (CSC–I), MCL 750.520b(1)(f) (personal injury and force or coercion). He was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction, and 225 months to 40 years' imprisonment for the CSC–I conviction. Defendant appeals as of right. We affirm.

Defendant's first argument is that there was insufficient evidence of penetration for the jury to be able to find beyond a reasonable doubt that he committed CSC–I, and the felony information failed to provide him with adequate notice of the nature of the CSC–I charge. After beating the victim, strangling her, and duct-taping garbage bags over her head, defendant retrieved an air rifle from his vehicle and shot the victim several times. One of those shots he directed "at" her vagina; at the time, he was standing over her and she was lying naked on the floor. Defendant accurately points out that the information and the instruction given to the jury indicated that defendant accomplished the penetration with the rifle; however, the evidence shows that defendant never brought the rifle itself into any kind of direct physical contact with the victim's genitalia. Rather, the pellet penetrated the victim's left labia majora. Although perhaps a horrific fact pattern, we find the information and evidence sufficient.

When CSC–I is charged pursuant to MCL 750.520b(1)(f), the prosecution must prove three elements: (1) the defendant caused personal injury to the victim; (2) the defendant engaged in sexual penetration with the victim; and (3) the sexual penetration was accomplished by use of force or coercion. *People v. Nickens*, 470 Mich. 622, 629; 685 N.W.2d 657 (2004). "Sexual penetration" is defined, in relevant part, as including "any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(r). Relatively few cases have directly addressed whether the labia comes within the scope of "sexual penetration." However, those cases have uniformly held that the Legislature intentionally specified and distinguished "genital opening" from "vagina," and the labia majora is part of the "genital opening." *People v. Bristol*, 115 Mich. App. 236, 237–238; 320 N.W.2d 229 (1981); *People v. Whitfield*, 425 Mich. 116, 135 n. 20; 388 N.W.2d 206 (1986); *People v. Legg*, 197 Mich. App. 131, 132–134; 494 N.W.2d 797 (1992); *People v. Lockett*, 295 Mich. App. 165, 188; 814 N.W.2d 295 (2012). We will not read into the statute any requirements not stated. We therefore find that the pellet intruded into the victim's genital opening.

Furthermore, we will not infer a requirement into the statute that defendant maintain physical contact with the penetrating object where he was unambiguously the proximate and immediate cause of that penetration. For the same reason, we do not find the information or the jury instruction insufficient. We think that they *could* have been more clear; however, there can be no doubt that defendant used the air rifle to effectuate the penetration. The pellet, for all practical purposes, was part of the rifle as a total instrumentality. We do not think the information and instruction inconsistent with the evidence, and at worst any vagueness in the information was obviated by testimony at the preliminary examination. Defendant did not object to the information, and any error therein does not rise to plain error affecting his substantial rights. See *People v. Bailey*, 310 Mich. App. 703, 715–716; 873 N.W.2d 855 (2015). A rational trier of fact could have found beyond a reasonable doubt that defendant used the air rifle to penetrate the victim's genital opening. See *People v.*

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Unger, 278 Mich. App. 210, 222, 253; 749 N.W.2d 272 (2008).

***2** Defendant next argues that the trial court erred by denying his request for a jury instruction regarding voluntary manslaughter. We disagree. Manslaughter is, literally, "murder without malice," and the voluntary manslaughter defendant proposes here must be an intentional act of killing committed as a direct and immediate response to a "reasonable provocation" before the actor has had a reasonable opportunity to regain self-control. *People v. Mendoza*, 468 Mich. 527, 533–536; 664 N.W.2d 685 (2003). Such provocation is not an element of manslaughter, but rather a circumstance that can negate the existence of malice. *Id.* at 536. "[A] trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion." *People v. Waclawski*, 286 Mich. App. 634, 675; 780 N.W.2d 321 (2009).

This issue is complicated by defendant's obviously dubious attachment to reality evidenced by a number of statements he made at his police interview, including apparently having seen the victim alive the next day; discussing involvement in various military forces that proved unverifiable; the victim forcibly drugging him with a variety of improbable substances and selling him to other women multiple times over the course of their relationship; the victim having admitted to killing 30,001 people; and the victim making threats involving defendant's nonexistent son. On the day of the murder, defendant and the victim had sex, and according to defendant, at some point during that encounter, the victim maneuvered him into a position where she could have snapped his neck. Apparently, she also somewhat contemporaneously either threatened the aforementioned nonexistent son or stated that she had killed him. Defendant contended that he then jumped out of bed, hit her with his cane (which broke), and attempted to leave, at which point the victim threw a gumball machine at him.

Despite admitting that he suffered only a few scrapes, defendant then attacked the victim with the same gumball machine, breaking it in the process and causing her severe injuries. As the victim was lying on the floor, defendant then put several strips of duct tape over her mouth, placed a trash bag that was still full of trash over her head, and secured it in place with more duct tape and a large lace doily. It was then that he retrieved the pellet rifle, shot her multiple times, poured bleach on her, and then cleaned himself and his dog up and left the scene.

Taking defendant's contradictory and confused statements in the light most favorable to him, we cannot find reasonable provocation. Presuming, although not deciding, that whatever occurred while defendant and the victim were having sex could have been perceived as threatening, defendant conceded that any such threat had been terminated and, critically, *he was leaving*. Notably, reasonable provocation is not the same as diminished capacity: the trial court correctly observed that the reasonableness of a provocation is objective and based on "that which would cause a *reasonable person* to lose control." *People v. Sullivan*, 231 Mich. App. 510, 518; 586 N.W.2d 578 (1998) (emphasis in original). Defendant was unambiguously not under any serious imminent threat, and the evidence overwhelmingly shows that whatever other provocation might have occurred was mostly to completely delusional. A defendant's delusions might, under the right circumstances and in the right case, be relevant to a claim of diminished capacity or insanity, but a defendant's unique mental state is not relevant to the determination of reasonable provocation for purposes of voluntary manslaughter. *Id.* at 519–520.

The trial court properly refused to give defendant's requested voluntary manslaughter instruction. In any event, the jury was offered the choice of finding defendant guilty of the lesser offense of second-degree murder, and it chose not to take that choice. This demonstrates that the jury would have been unlikely to convict defendant of the lesser offense of voluntary manslaughter even if the instruction had been given. *People v. Raper*, 222 Mich. App. 475, 483; 563 N.W.2d 709 (1997). Finally, the absence of the instruction did not preclude defendant from arguing that he should be acquitted altogether on the theory that his real offense was not provided as an option. Consequently, even if the trial court had committed error, it was harmless.

***3** Next, defendant argues that he is entitled to resentencing because his sentence was imposed before the Michigan Supreme Court found that the statutory sentencing guidelines were unconstitutional in *People v. Lockridge*, 498 Mich. 358, 392; 870 N.W.2d 502 (2015). Defendant does not explicitly limit his claim of error to his CSC–I sentence, but implicitly must, because the mandatory life sentence to which he was contemporaneously sentenced for first-degree murder is not subject to the statutory sentencing

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guidelines. MCL 769.34(5). We therefore need not address this issue at all: the contemporaneous mandatory life sentence "effectively nullifies the significance of any sentences for the companion convictions." *People v. Watkins*, 209 Mich. App. 1, 5; 530 N.W.2d 111 (1995). Because defendant cannot demonstrate that any error "affected the outcome of the lower court proceedings," *Lockridge*, 498 Mich. at 393, it is unnecessary to consider whether there was in fact any error.

In his Standard 4 brief, defendant contends that the trial court erred by admitting a series of graphic photographs from Neumann's autopsy because they were unfairly prejudicial and unnecessary to the prosecution's case. We disagree.

Defendant does not suggest that the autopsy photographs were irrelevant under MRE 401, nor would any such assertion have been reasonable. The autopsy photographs depicted the nature and extent of the victim's injuries, which made defendant's premeditation and deliberation more probable than it would have been without the evidence. See *People v. Gonzalez*, 468 Mich. 636, 641–642; 664 N.W.2d 159 (2003) (stating that manual strangulation may evidence elapsed time between initial homicidal thought and ultimate action for purposes of establishing first-degree premeditated murder). The photographs were also helpful in corroborating the testimony about the lengthy process employed by defendant to kill the victim, and to illustrate the medical testimony provided. Their relevance and probative value were not trivial.

Conversely, it is not seriously disputable that the photographs were disturbingly graphic. The victim's injuries were severe and her body had been decomposing for approximately a week before the autopsy took place. As a result of the decomposition process and the caustic nature of the bleach that was poured on her, many areas of skin were discolored and there was significant sloughing of the skin visible in the photographs. Numerous injuries, ranging from pellet wounds to lacerations to bruising and lividity. Even the prosecution characterized the photographs as "bloody, brutal, [and] graphic." In fact, during the presentation of the autopsy photographs, one juror lost consciousness. However, there is no direct indication that the photographs were the cause of the juror's infirmity, and the trial court, prosecution, and defense counsel all agreed that the incident involving the juror did not affect the manner in which the trial proceeded and would be unlikely to influence the remaining jurors' ability to continue with the case.

Even relevant evidence may be excluded at the trial court's discretion " 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *People v. Blackston*, 481 Mich. 451, 461; 751 N.W.2d 408 (2008), quoting MRE 403. Photographic evidence need not be excluded merely because it is gruesome or because a witness could orally describe what a photograph depicts. *People v. Mills*, 450 Mich. 61, 76–78; 537 N.W.2d 909 (1995). There is no indication that the photographs here were intended for an improper purpose, and although we appreciate that the photographs were disturbing and thus had *some* potential for unfair prejudice, we are simply not persuaded that the danger of unfair prejudice *substantially outweighed* their probative value. In any event, we believe the issue to be a close one, and there is generally no abuse of discretion when the trial court's decision involves a close evidentiary question, *People v. Sabin (After Remand)*, 463 Mich. 43, 67; 614 N.W.2d 888 (2000). We do not find the photographs to have been improperly admitted.

***4** Defendant finally argues that trial counsel was ineffective for acquiescing to the admission of the autopsy photographs and failing to present an insanity defense. We disagree.

As discussed, we find no error in the admission of the autopsy photographs. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v. Ericksen*, 288 Mich. App. 192, 201; 793 N.W.2d 120 (2010). Defendant cannot establish a reasonable probability that the outcome of the proceeding would have been different had counsel objected. *People v. Vaughn*, 491 Mich. 642, 671; 821 N.W.2d 288 (2012).

Pursuant to MCL 768.21a(1), a defendant facing criminal charges may assert legal insanity as an affirmative defense. *People v. Carpenter*, 464 Mich. 223, 230–231; 627 N.W.2d 276 (2001). Legal insanity requires a defendant to "lack[ ] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law" because of a "mental illness." MCL 768.21a(1). "Mental illness" is defined as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the

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ordinary demands of life." MCL 330.1400(g). A defendant asserting legal insanity as a defense has the burden of proving the defense by a preponderance of the evidence. MCL 768.21a(3); *Carpenter*, 464 Mich. at 231.

Clearly, defendant was suffering from a mental illness; his bizarre tangents and statements during his police interview can lead to no other conclusion. It is apparently not disputed that trial counsel was aware that defendant had an extensive history of mental illness including delusions and hallucinations. However, mental illness is merely a prerequisite to an insanity defense. Defendant's statements also make it clear that he was well aware of what he was doing; at most, he was deluded about why. A psychological evaluation was conducted that concluded that defendant was not legally insane at the time of the crimes. The psychologist acknowledged that some of defendant's statements, if taken at face value, cast some doubt on his capacity to appreciate the nature and quality or wrongfulness of his actions, or otherwise to conform his conduct to the requirements of the law. However, defendant's varying accounts demonstrated that he was an unreliable informant, and the psychologist's observation of defendant and review of various records revealed that defendant had a history of manipulation and deceitfulness which suggested that his exculpatory statements may have been consciously designed to avoid prosecution.

Consequently, it does not appear that defense counsel's decision to forgo an insanity defense was objectively unreasonable. See *People v. Snider*, 239 Mich. App. 393, 425; 608 N.W.2d 502 (2000) (stating that "[t]rial counsel is not required to advocate a meritless position"). Had defense counsel nevertheless asserted an insanity defense at trial, it seems certain that the prosecution would have responded by relying on the psychologist's opinion that defendant was legally sane at the time of the offense. Because defendant's unsupported theory would have been rebutted by a contrary expert opinion, and as noted his own statements were at best equivocally supportive of possible insanity, it is not reasonably probable that the outcome of the trial would have been different had defense counsel advanced an insanity defense. We decline to consider defendant's request, in his supplemental Standard 4 brief, for us to expand the record on appeal to consider additional medical records. MCR 7.219(A)(1); *People v. Williams*, 241 Mich. App. 519, 524 n. 1; 616 N.W.2d 710 (2000). Defendant's supplemental Standard 4 brief appears, in any event, to conflate mental illness, even severe mental illness, with legal insanity. We are not persuaded that there is any reasonable probability that an insanity defense would have been successful if it had been attempted.

***5** Affirmed.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Charles Frazier YOUNG, Defendant–Appellant.
People of the State of Michigan, Plaintiff–Appellee,
v.
Charles Frazier Young, Defendant–Appellant.

Docket Nos. 324607, 324608.
|
March 10, 2016.

Wayne Circuit Court; LC No. 12–004096–FC, LC No. 12–004097–FH.

Before: M.J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

Opinion

PER CURIAM.

***1** Defendant appeals as of right his jury convictions of two counts of first-degree murder, MCL 750.316(1)(a), one count of mutilation of a dead body, MCL 750.160, and one count of arson of a dwelling house, MCL 750.72(1)(a). We affirm.

This case arises from the murders of David Simard and Felicidad Tabares at the home shared by defendant and codefendant Salim Nafsu, the mutilation of their corpses, and the subsequent arson of the home in which they were killed. Defendant and Nafsu were tried together by a single jury. Once trial began, Nafsu's attorney asserted that defendant was to blame for all of the offenses and Nafsu was an innocent bystander or a victim.

I. FAILURE TO DECLARE A MISTRIAL

Defendant contends that the "antagonistic and irreconcilable" defenses he and Nafsu asserted mandated severance of their trials; thus, the trial court erred in failing to grant a mistrial on severance grounds. We disagree.

Defendant contends that the trial court erred in refusing his request for a mistrial, but his argument on appeal strictly addresses the court's decision in a severance context. Defense counsel, however, did not move to sever the trials, did not file a response to the prosecution's motion to consolidate, and did not object to joinder in a substantive way at any stage of the proceedings. Thus, the issue is unpreserved. See *People v. Mayfield,* 221 Mich.App 656, 660; 562 NW2d 272 (1997). We review unpreserved issues for plain error affecting substantial rights. *People v. Carines,* 460 Mich. 750, 763–764; 597 NW2d 130 (1999). An error affects the defendant's substantial rights if it prejudiced the defendant by affecting the outcome of the trial. *Id* .

Generally speaking, "[a] mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant and impairs his ability to get a fair trial." *People v. Waclawski,* 286 Mich.App 634, 708; 780 NW2d 321 (2009) (citation and quotation marks omitted). The error or irregularity must be so egregious that a mistrial is the only way to remove its prejudicial effect. *People v. Horn,* 279 Mich.App 31, 36; 755 NW2d 212 (2008).

As a threshold matter, we note that the trial court properly granted joinder of the various charges against defendant and Nafsu and appropriately exercised its discretion in opting to try the men together. See MCL 768.5 ("When 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court."); MCR 6.120(B) (providing that joinder of multiple offenses against a single defendant is appropriate when, among other circumstances, the offenses are based on a series of connected acts or the same transaction or occurrence). Assuming proper joinder, then, defendant's right to severance was governed by MCR 6.121(C), which provides that "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant[,]" and MCR 6.121(D), which grants a trial court discretion to sever defendants' trials, upon a party's motion, when "appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants."

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***2** MCR 6.121(C) mandates severance "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v.. Hana,* 447 Mich. 325, 346; 524 NW2d 682 (1994), amended in part on reh sub nom *People v. Gallina,* 447 Mich. 1203 (1994) and *People v. Rode,* 447 Mich. 1203 (1994). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Id.* at 346–347.

Inconsistent defenses do not meet the threshold for mandated severance under MCR 6.121(C), nor does "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial[.]" *Hana,* 447 Mich. at 349. Instead, the defenses must be mutually exclusive or irreconcilable, meaning that "the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the codefendant." *Id.* at 349–350 (citation and quotation marks omitted). In sum, a trial court should grant a request for severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 359–360 (citation and quotation marks omitted).

The trial court did not err in refusing defendant's request for a mistrial. Indeed, we question whether defense counsel actually made a request for a mistrial on severance grounds, as defendant contends on appeal. Rather, defendant asked the court to consider two alternatives—a mistrial or a cautionary instruction—to mitigate perceived prejudice stemming from Nafsu's decision not to testify and from what Nafsu's lawyer might potentially say during his closing argument. Defense counsel noted that "this case likely should have been severed" given the new defense theories from Nafsu's opening statement and closing argument, but she never requested severance during the trial. Nor did defendant's counsel present a supporting affidavit or make an offer of proof demonstrating that defendant's substantial rights would be prejudiced and that severance under MCR 6.121(C) was the necessary means of rectifying the potential prejudice. See *Hana,* 447 Mich. at 346. Failure to make this showing precluded reversal of the court's implicit decision to deny severance. See *id.* at 346–347.

Further, assuming that defendant had presented an affidavit or offer of proof, the evidence did not support severance. Certainly, Nafsu's lawyer and his theories were antagonistic toward defendant, but it does not necessarily follow that defendant's and Nafsu's defenses were mutually exclusive or irreconcilable. See *id.* at 349 (noting that multiple defendants' attempts to "escape conviction by pointing the finger at each other" do not require severance). Rather, to be mutually exclusive or irreconcilable, the jurors would necessarily have had to disbelieve evidence offered on behalf of defendant in favor of that offered by Nafsu. *Id.* at 349–350. Neither man offered any evidence whatsoever, though, and the evidence that the prosecution introduced implicated both defendant and Nafsu, either directly or under an aiding-and-abetting theory. The contentions of Nafsu's lawyer—namely, that his client was innocent, defendant committed all of the crimes on his own, and defendant tried to murder Nafsu by burning the house down around him—may have been inflammatory and influential, but they were not evidence, and the trial court instructed the jury to that effect in preliminary and final instructions.

***3** Moreover, the trial court also instructed the jurors that they were only to consider properly admitted evidence in reaching their verdicts, and that they were to consider all of the evidence against defendant and Nafsu separately. Thus, even if the statements of Nafsu's lawyer were prejudicial to defendant, the court's instructions presumably cured the potential prejudice. See *People v. Abraham,* 256 Mich.App 265, 279; 662 NW2d 836 (2003). Accordingly, defendant fails to establish that the defenses he and Nafsu asserted were mutually exclusive or irreconcilable, that the trial court's failure to grant severance resulted in a serious risk of prejudice to his trial rights, or that the joint trial prevented the jurors "from making a reliable judgment about guilt or innocence." *Hana,* 447 Mich. at 359–360. Defendant asserts no other grounds for mistrial and fails to highlight any error or irregularity in the proceedings that prejudiced him and impaired his ability to get a fair trial. See *Waclawski,* 286 Mich.App at 708. Therefore, the trial court's refusal to grant a mistrial did not constitute plain error affecting substantial rights. See *Carines,* 460 Mich. at 763.

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II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that his counsel was ineffective for failing to move for severance and, further, that failure prejudiced defendant by denying him a fair trial. In a Standard 4 brief, defendant argues that counsel was also ineffective for failing to investigate witnesses, adequately cross-examine prosecution witnesses, and investigate defendant's mental-health history and treatment for purposes of mounting an insanity defense. We disagree with each of defendant's contentions on the issue.

To preserve a claim of ineffective assistance of trial counsel for appellate review, a defendant must move for a new trial or for a *Ginther*[1] hearing in the trial court. *People v. Lopez,* 305 Mich.App 686, 693; 854 NW2d 205 (2014). Defendant did not move for a new trial or a *Ginther* hearing in the trial court; therefore, this issue is unpreserved for appellate review and our review is limited to errors apparent on the record. See *id.* (citation omitted).

"To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance." *People v. Walker,* 497 Mich. 894, 895; 855 NW2d 744 (2014). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v. Carbin,* 463 Mich. 590, 600; 623 NW2d 884 (2001). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. 668, 694; 104 S Ct 2052; 80 L.Ed.2d 674 (1984).

***4** "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v. Eisen,* 296 Mich.App 326, 329; 820 NW2d 229 (2012) (citation omitted). More specifically, there is a strong presumption that defense counsel employed effective trial strategy, *People v. Payne,* 285 Mich.App 181, 190; 774 NW2d 714 (2009), and we "will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence," *People v. Unger,* 278 Mich.App 210, 242–243; 749 NW2d 272 (2008). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v. Matuszak,* 263 Mich.App 42, 61; 687 NW2d 342 (2004). Importantly, too, the defendant bears the burden of establishing the factual predicate for a claim of ineffective assistance of counsel. *People v. Hoag,* 460 Mich. 1, 6; 594 NW2d 57 (1999).

A. MOVING FOR SEVERANCE

Defense counsel's failure to move for severance did not constitute ineffective assistance. As discussed above, defendant and Nafsu did not assert the mutually exclusive or irreconcilable defenses that would mandate severance under MCR 6.121(C). See *Hana,* 447 Mich. at 349. On any party's motion, however, the court could also grant severance under MCR 6.121(D), which provides:

> On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

It is highly unlikely that the trial court would have granted a motion for severance under MCR 6.121(D). The court had already told the parties, "I don't see why these cases have to be tried separately[,]" and "I don't see the necessity for separating the cases." The court had also denied Nafsu's request for a bench trial, holding that a single jury in a single trial could decide the issues. The trial court noted that the appropriate remedy for the antics of Nafsu's lawyer was jury instructions, not a mistrial or severance. Additionally, the court told the attorneys that "I still don't think that we have a situation here where the jury is likely to lump the two [d]efendants together unjustly and not based on the evidence

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and the law that applies to this case[,]" demonstrating that the court did not see a significant potential "for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence[.]" See MCR 6.121(D). And since defense counsel only learned of Nafsu's blame-shifting strategy once the trial began, considerations of timeliness preponderated against the court granting a severance motion as well. See *id.* Finally, it would have been inconvenient to recall all of the witnesses—particularly the ones who were, at that very moment, in court and ready to testify—for a separate trial. See *id.* Thus, any severance motion would have been futile, and defense counsel's failure to make such a motion did not fall below an objective standard of reasonableness. See *Walker,* 497 Mich. at 895.

***5** Nor has defendant established prejudice as a result of the alleged error. Despite his blanket assertion that the joint trial deprived him of his right to a fair trial, defendant was convicted on the strength of witness testimony, forensic evidence, DNA evidence, and surveillance videos—all of which would have been arrayed against him even if the trials had been severed. Defendant thus fails to establish the second prong of his ineffective—assistance claim. See *id.*

B. INVESTIGATING WITNESSES

"Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v. McGhee,* 268 Mich.App 600, 626; 709 NW2d 595 (2005). Provided that defense counsel makes a complete investigation, however, the decision regarding what evidence to present is a matter of trial strategy. *Wiggins v. Smith,* 539 U.S. 510, 521–522; 123 S Ct 2527; 156 L.Ed.2d 471 (2003). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Payne,* 285 Mich.App at 190 (citation and quotation marks omitted). "A substantial defense is one that might have made a difference in the outcome of the trial ." *People v. Chapo,* 283 Mich.App 360, 371; 770 NW2d 68 (2009) (citation omitted).

Deloneo Young, who was incarcerated in the Wayne County Jail with defendant, served as a witness for the prosecution at trial. According to Young, defendant had confessed that he and Nafsu killed Simard and Tabares, and defendant had further described the subsequent attempts to destroy evidence of the murders. Young later entered into an agreement with the Wayne County Prosecutor's Office whereby, in exchange for his testimony, he would receive probation rather than jail time for his own recent criminal conviction.

On appeal, defendant asserts that Young spoke with two fellow inmates of the Wayne County Jail, William Hunt and Christopher "Black" Lomax, and asked them to "jump on" defendant's case with him. But there is simply no evidence of such a conversation in the lower court record, and this court's review is limited to errors apparent on the record because defendant failed to preserve his ineffective-assistance claim. See *Lopez,* 305 Mich.App at 693. Defendant thus fails to establish the factual predicate for his claim. See *Hoag,* 460 Mich. at 6.

Moreover, we fail to discern how further investigating Hunt and Lomax, calling them as witnesses, or questioning Young more strenuously about them would have served his cause. Detroit Police Officer Allen Williams testified that he took Young seriously because Young possessed information about the murders that was unknown to the general public. Regardless of whether Young tried to convince the other inmates to support his account of his conversation, it did not invalidate his information, which he related to authorities before he read portions of defendant's discovery packet. Calling Hunt and Lomax as witnesses could have further damaged Young's credibility because they might have been able to refute his claims that he did not know them, but his credibility was already sufficiently damaged: his testimony was halting and inconsistent, he admitted that he did not want to be there, and he was forced to admit on cross-examination that selfish reasons motivated him to contact the authorities. His in-court testimony varied far enough from his original statement that the court excused him from the stand and allowed him to go over the statement thoroughly before resuming testimony.

***6** Finally, contrary to defendant's protestations, defense counsel was justified in not cross-examining Young about Hunt and Lomax at trial. Young had flatly denied knowing or speaking to either man when he testified at the preliminary examination, and it is unlikely that his testimony would have changed at trial, no matter how many times defense counsel asked him. Particularly given the limited utility of any questions about Hunt and Lomax, defense counsel's decision to avoid the issue with Young was merely a matter of trial strategy. And defendant has done nothing to rebut the strong presumption that the strategy was effective despite his eventual conviction. See *Payne,* 285 Mich.App at 190.

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C. CROSS–EXAMINING LAWLESS

Defendant's ex-girlfriend, Francine Lawless, was the first to discover the deaths of Simard and Tabares, and she testified regarding defendant's and Nafsu's statements about the murders. During her direct examination, she admitted smoking crack at a motel with defendant and Nafsu the night after the murders. She also noted that she had prescriptions for Xanax and Vicodin, and she confessed that she had lied to the police in her original statement because she "wanted to lie for [defendant] for a minute." Defendant, however, argues that defense counsel was ineffective for failing to more strenuously cross-examine Lawless about her drug use and her preexisting mental conditions.

Defense counsel's choices in this regard constituted trial strategy. By the time defense counsel began cross-examination, Lawless had already told the jury that she had smoked crack, held prescriptions for powerful medications, and omitted incriminating information against defendant when she first spoke to the police. Defense counsel, as well as Nafsu's lawyer, both asked her whether she had smoked crack at the hotel, and she once again admitted that she had. Defense counsel additionally asked if smoking crack had ever affected Lawless's personality or memory, and Lawless replied that it had not. Defendant argues that more aggressive questioning could have damaged Lawless's credibility, but there is no evidence for the argument—she had already admitted illegal drug use and lying to the police, and there is no evidence in the record to suggest that she was a drug addict or had a mental condition that would have rendered her testimony suspect.

Like decisions regarding which witnesses to call, the manner and extent to which an attorney examines a witness is presumed to be a matter of trial strategy. *People v. Russell,* 297 Mich.App 707, 716; 825 NW2d 623 (2012). Consequently, that decision only constitutes ineffective assistance of counsel if it deprived defendant of a substantial defense. *Id.* Defendant's ineffective-assistance claim therefore fails because he does not demonstrate that examining Lawless more extensively or aggressively could have made a difference in the trial's outcome or that counsel's strategy fell below an objective standard of reasonableness. See *Walker,* 497 Mich. at 895.

D. INVESTIGATING DEFENDANT'S MENTAL HEALTH

***7** "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *Chapo,* 283 Mich.App at 371. Defendant contends that his counsel failed to adequately explore the depths of his mental-health history and ongoing treatment, including an allegation that psychotropic medication so incapacitated him that he was unable to assist in his own defense.

There is no evidence that defendant was incapable of assisting in his own defense at any stage of the proceedings, that counsel could have validly considered an insanity defense, or that defendant's mental-health condition warranted a competency evaluation. Instead, defendant responded appropriately during his trial when the court conducted voir dire regarding his decision not to testify and spoke briefly but coherently at sentencing. The presentence investigation report provides that defendant took a quintet of prescription medications for a host of reasons, but defendant self-reported that information—and, in any event, there is no evidence that any of the medications or self-reported psychological issues warranted further investigation by defense counsel. Further, Young testified during the preliminary examination that defendant had related a plan to him wherein defendant and Nafsu would "play crazy for court[.]" Thus, defendant fails to establish the factual predicate of his claim because the lower record does not in any fashion establish his mental illness or lack of criminal culpability. See *Hoag,* 460 Mich. at 6.

III. VOLUNTARY–MANSLAUGHTER INSTRUCTION

Defendant contends that the trial court erred in failing to instruct the jury on voluntary manslaughter because the evidence supported the instruction, a question of fact existed regarding whether Simard and Tabares had sufficiently provoked defendant, and the failure to give the instruction undermined the jury's guilty verdict. We disagree.

Generally, we review de novo a party's claim of instructional error. *People v. Hartuniewicz,* 294 Mich.App 237, 242; 816 NW2d 442 (2011). We review for an abuse of discretion, however, "a trial court's determination that a specific instruction is inapplicable given the facts of the case." *Id.* "A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes."

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People v. Uphaus (On Remand), 278 Mich.App 174, 181; 748 NW2d 899 (2008). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v. Dupree,* 486 Mich. 693, 702; 788 NW2d 399 (2010).

"When a defendant is charged with murder, the trial court must give an instruction on voluntary manslaughter if the instruction is supported by a rational view of the evidence." *People v. Mitchell,* 301 Mich.App 282, 286; 835 NW2d 615 (2013) (citation and quotation marks omitted). That is, evidence must exist from which a jury could rationally conclude that the defendant acted "in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v. Reese,* 491 Mich. 127, 143; 815 NW2d 85 (2012) (citation omitted). "The degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *People v. Tierney,* 266 Mich.App 687, 714715; 703 NW2d 204 (2005) (citation and quotation marks omitted). The provocation must be sufficient to "cause a reasonable person to lose control." *Id.* at 715 (citation and quotation marks omitted). An instructional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v. Lukity,* 460 Mich. 484, 495–496; 596 NW2d 607 (1999) (citation and quotation marks omitted).

***8** The trial judge's refusal to give a voluntary-manslaughter instruction did not constitute an abuse of discretion. As an initial matter, we note that defendant arguably waived the issue of erroneous jury instructions because defense counsel specifically expressed satisfaction with the trial court's instructions. See *People v. Wood,* 307 Mich.App 485, 519; 862 NW2d 7 (2014), vacated in part on other grounds 871 NW2d 154 (2015).

Assuming, however, that defendant had not waived the issue, a rational view of the evidence did not support a voluntary-manslaughter instruction. Evidence regarding the last moments of Simard and Tabares was almost entirely derived from two sources: Lawless's testimony about the statements defendant made to her and the medical examiner's testimony. Lawless merely relayed that the fight was about drugs, that Simard had pushed defendant, and that defendant had hit Simard over the head. The medical examiner testified that Simard's and Tabares's bodies showed evidence of head wounds, but that the wounds were superficial and both had been killed by deep slashes across their throats. There was simply no evidence by which a jury could rationally conclude that defendant acted in the heat of passion, that he was adequately provoked, or that the circumstances failed to present a lapse of time during which he could "control his passions." *Reese,* 491 Mich. at 143. Instead, the evidence tended to show that defendant and Simard were involved in a scuffle, defendant hit Simard over the head, and Simard and Tabares were eventually killed—perhaps while incapacitated by their head wounds—by knife slashes to the throat. Accordingly, the trial judge's refusal to instruct the jurors on voluntary manslaughter did not constitute an abuse of discretion because it was within a range of reasonable and principled outcomes. See *Uphaus (On Remand),* 278 Mich.App at 181. But even if the court abused its discretion in refusing to give the instruction, such error was harmless because the jurors rejected the lesser offense of second-degree murder in favor of finding defendant guilty of first-degree murder—a clear indication that the jury was unwilling to convict on a lesser offense like manslaughter. See *Lukity,* 460 Mich. at 495–496; *People v. Raper,* 222 Mich.App 475, 483–484; 563 NW2d 709 (1997) (holding that, assuming the trial court erred in failing to give a manslaughter instruction, the error was harmless because the jury's decision to convict the defendant of first-degree murder rather than second-degree murder "reflected an unwillingness to convict of a lesser included offense such as manslaughter").

Affirmed.

All Citations

Not Reported in N.W.2d, 2016 WL 930745

Footnotes

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1 *People v. Ginther,* 390 Mich. 436, 443; 212 NW2d 922 (1973).

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LABORATORY REPORT

Laboratory No.	: DCI17-4957	Record No.	: 1
Investigating Ofcr.	: Jeb Rutledge	Date Received	: August 28, 2017
Agency	: Detroit Police Department	Time Received	: 12:56 p.m.
Agency No.	: 1708270022	Date Completed	: September 8, 2017

Nature of Offense:

0900-1 - Murder/Nonnegligent Manslaughter

Victim:

Glover, Michael

Evidence Received:

Container 1 — 1 - Tape sealed envelope (DPD Item 2), containing:

Container 1-1	1 - Unsealed envelope (1), containing:
Item 1-1	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-2	1 - Unsealed envelope (2), containing:
Item 1-2	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-3	1 - Unsealed envelope (3), containing:
Item 1-3	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-4	1 - Unsealed envelope (4), containing:
Item 1-4	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-5	1 - Unsealed envelope (5), containing:
Item 1-5	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-6	1 - Unsealed envelope (6), containing:
Item 1-6	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-7	1 - Unsealed envelope (7), containing:
Item 1-7	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-8	1 - Unsealed envelope (8), containing:
Item 1-8	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-9	1 - Unsealed envelope (9), containing:
Item 1-9	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-10	1 - Unsealed envelope (10), containing:
Item 1-10	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-11	1 - Unsealed envelope (11), containing:
Item 1-11	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-12	1 - Unsealed envelope (12), containing:
Item 1-12	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-13	1 - Unsealed envelope (13), containing:
Item 1-13	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-14	1 - Unsealed envelope (14), containing:
Item 1-14	**1 - 9mm Luger caliber FC fired cartridge case.**

PEOPLE'S EXHIBIT 259

This report contains the conclusions, opinions, and/or interpretations of the laboratory analyst whose signature appears on this report. This analyst is qualified by education, training, and experience to perform this analysis and does so as part of his or her regular duties. The analysis was conducted in an MSP laboratory accredited under the ASCLD/LAB International testing program since February 16, 2017.

The relevant supporting data upon which the expert opinion or inference was made are available for review/inspection.

Laboratory No.: DCI17-4957 Record No.: 1 Date of Report: September 13, 2017
Agency No.: 1708270022

Container 1-15	1 - Unsealed envelope (15), containing:
Item 1-15	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-16	1 - Unsealed envelope (16), containing:
Item 1-16	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 1-17	1 - Unsealed envelope (17), containing:
Item 1-17	**1 - 9mm Luger caliber FC fired cartridge case.**
Container 2	1 - Tape sealed envelope (DPD Item 5), containing:
	1 - String tied envelope, containing:
Item 2	**1 - Fired bullet.**

Results of Physical/Microscopic Examination:

Items 1-1 through 1-17 (fired cartridge cases) are identified as having been fired in the same firearm.

Item 2 is consistent will being .38/9mm caliber class fired bullet displaying conventional rifling specifications of six lands and grooves with a right twist.

Item 1-1 was submitted for entry into the National Integrated Ballistic Information Network (NIBIN) database. The submitting agency will be notified of any investigative leads.

D/Sgt. Dean Molnar Jr.
State Police Specialist
Firearms/Toolmarks Unit
email: molnard1@michigan.gov

September 13, 2017

cc: Andrew Guntzviller, Andrew Guntzviller

This report contains the conclusions, opinions, and/or interpretations of the laboratory analyst whose signature appears on this report. This analyst is qualified by education, training, and experience to perform this analysis and does so as part of his or her regular duties. The analysis was conducted in an MSP laboratory accredited under the ASCLD/LAB International testing program since February 16, 2017.

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