STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE TREADWELL,

Defendant-Appellant.

UNPUBLISHED
January 28, 1997

No. 162528
Recorder's Court
LC No. 92-002822

Before: Jansen, P.J., and Young and R.I. Cooper,* JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), as well as his conviction following a plea of guilty to being a fourth habitual felony offender, MCL 769.12; MSA 28.1084. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and fifty to seventy-five years' imprisonment for the habitual offender conviction.[1] We affirm.

Defendant first argues that he was denied effective assistance of counsel because defense counsel failed to investigate the criminal record of Carlos Bruner, one of the main prosecution witnesses, failed to impeach Bruner with his prior convictions, failed to discover that promises of leniency were given to Bruner, and misadvised defendant regarding the sentencing consequences of his habitual offender plea. We disagree.

Because the requested *Ginther* hearing was aborted, this issue will be considered by this Court only to the extent that counsel's claimed mistakes are apparent from the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective

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

standard of reasonableness, counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. As well, the defendant must show that any deficiency was prejudicial to his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Contrary to defendant's assertions, Bruner's criminal record, or lack thereof, was brought out at trial. During his cross-examination of Bruner, defense counsel asked Bruner if he had been convicted of a felony involving truth or dishonesty in the last ten years in an attempt to impeach him. Bruner denied having any such convictions. There is no other evidence on the record that Bruner was convicted of any crimes which had a bearing on his veracity, and any evidence of other crimes or wrong-doing would be inadmissible under MRE 609(a). *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). Further there is no evidence that Bruner was testifying in exchange for a promise of leniency and, as such, defendant's claim that counsel's failure to elicit this testimony constituted ineffective assistance is without merit. Therefore, defendant's claim that he was denied effective assistance of counsel because his attorney failed to investigate the witness' criminal history or inquire into his current status is not supported by the evidence. *Ginther*, *supra* at 443-444.

When reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, the pertinent inquiry is whether the defendant's plea was made voluntarily and understandingly, *People v Swirles (On Remand)*, 218 Mich App 133, 138; 553 NW2d 357 (1996), and whether counsel's advice was within the range of competence demanded of lawyers in criminal cases, *In re Oakland County Prosecutor*, 191 Mich App 113, 122; 477 NW2d 455 (1991). Here, there is no evidence on the record that counsel misrepresented to defendant that he would be sentenced to a specific term of years if he pleaded guilty. To the contrary, the record shows that defendant understood that his sentence could be enhanced and that he may be subject to a parolable life sentence. Thus, defendant's claim that counsel misrepresented the repercussions of pleading guilty to this offense is not borne out by the record. *Ginther*, *supra* at 443-444; *Swirles*, *supra* at 138; *Oakland County Prosecutor*, *supra* at 122.

Next, defendant contends that he is entitled to resentencing because the sentencing court improperly stated that it was basing its sentence, in part, on its belief that defendant was guilty of first-degree murder and, further, that the sentence of fifty to seventy-five years as a fourth habitual offender was disproportionate to both the offense and the offender. We disagree.

Provided permissible factors are considered, appellate review of a defendant's sentence is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the offense and the conduct of the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Here, during

a discussion of defendant's guidelines' calculations, the court stated that there was sufficient evidence to support a conviction of first-degree murder. The court then proceeded to sentence defendant to ten to fifteen years on the manslaughter conviction, vacate that conviction, and sentence defendant to fifty to seventy-five years on the habitual offender conviction, citing the heinous nature of the underlying offense, defendant's criminal history, and the need for rehabilitation as the basis for the sentence. Thus, contrary to defendant's assertion, the sentencing court did not base its sentence, even in part, upon its belief that defendant was guilty of first-degree murder. *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993); *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986). Even if the court did base its sentence in part upon its belief that defendant was guilty of first-degree murder, such a consideration is proper. *People v Lawrence*, 206 Mich App 378, 379-380; 522 NW2d 654 (1994).

With regard to the proportionality issue, defendant had a prior criminal record which extended back to 1980 and consisted of convictions for carrying a concealed weapon, possession of heroin, and receiving and concealing stolen property, as well as several arrests for disorderly conduct. Further, defendant committed the instant offense less than one month after being released from parole. Thus, when looking at the offense and the offender, and balancing society's need for protection against its interest in rehabilitating criminals, defendant's sentence of fifty to seventy-five years was proportionate to both the offense and the offender. *Milbourn*, *supra* at 635-636, 654; *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995).

Finally, defendant argues that the trial court abused its discretion in denying his motion for new trial, because the record on remand evidenced that a new witness' testimony was recently discovered, the testimony was not cumulative but rather corroborative of defendant's defense theory, defendant could not have reasonably discovered this testimony before trial, and the testimony would render a different result on retrial. We disagree.

The grant or denial of a motion for new trial is within the trial court's discretion and will not be reversed absent a clear abuse of that discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). To obtain a new trial on the basis of newly discovered evidence, the defendant must show: 1) that the evidence itself, and not merely its materiality, is newly discovered; 2) the evidence is not cumulative; 3) the new evidence on retrial would probably cause a different result; and 4) the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). Here, although the new witness' testimony was newly discovered and was not merely cumulative, this Court is not convinced that it would cause a different result on retrial. The testimony would undoubtedly bolster defendant's self-defense theory. However, the jury already seemed to accept his theory as a mitigating factor because it found defendant guilty of the lesser offense of voluntary manslaughter. Should a new jury also believe defendant's theory, based not only on defendant's testimony but also that of the new witness, they too might find him guilty of voluntary manslaughter. Thus, there would be no different result on retrial. *Miller*, *supra* at 46-47.

Therefore, this Court finds that the trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Hebert*, *supra* at 477.

Affirmed.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper

[1] Defendant's ten to fifteen year sentence for the voluntary manslaughter conviction was vacated before sentencing on the habitual offender conviction.