STATE OF MICHIGAN

OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROMMELL L. THOMPSON,

Defendant-Appellant.

UNPUBLISHED
January 28, 1997

No. 185849

Recorder's Court
LC No. 94-004028

Before : Cavanagh, P.J., and Reilly and C.D. Corwin, * JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of murder in the second degree, MCL 750.317; MSA 28.549. Defendant was sentenced to twenty to forty years in prison. We affirm.

Defendant makes several allegations of ineffective assistance of counsel that we will examine individually below. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US ___; 115 S Ct 923; 140 L Ed 2d 802 (1995).

Defendant first argues that he was denied the effective assistance of counsel due to trial counsel's failure to retain an expert to rebut testimony elicited from the medical examiner regarding the cause of the victim's death. We disagree. Defendant has failed to show, or even to argue, that trial counsel's omission regarding the retention of an expert to rebut the medical examiner's testimony was not sound trial strategy. See *Stanaway, supra*.

---

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

Defendant next contends that trial counsel failed to thoroughly advise him of his right to testify at trial and, consequently, defendant failed to testify in his own behalf, denying him a fair trial. A defendant's right to testify will be deemed waived where he elects not to testify or acquiesces in his counsel's decision that he should not testify. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). Moreover, the decision whether to testify is considered a matter of trial strategy which this Court will not disturb on appeal. *People v Johnson*, 168 Mich App 581, 586; 425 NW2d 187 (1988).

Because a *Ginther*[1] hearing was not held in the trial court, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Upon review of the record, we find no indication that defendant's trial counsel failed to advise defendant of his right to testify at trial. Therefore, defendant has failed to overcome the general presumption of sound trial strategy, as well as the specific presumption that the election not to testify was a strategic decision. See *Simmons, supra*; *Johnson, supra*.

Defendant also asserts that the psychological trauma he experienced upon discovering the victim's body clouded his judgment and led to a false confession; therefore, he was denied effective representation as a result of counsel's failure to move for a *Walker*[2] hearing to suppress the statement that defendant gave to the police. We disagree.

When a defendant challenges the admissibility of his statements, the trial court must hear testimony, outside the presence of the jury, regarding the circumstances of the making of those statements. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law which the court must determine under the totality of the circumstances. *People v Garwood*, 205 Mich App 553, 558; 517 NW2d 843 (1994); *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). In determining whether a statement was voluntarily made, the trial court should consider, among other things, the following factors: (1) the age of the accused; (2) the education or intelligence level of the accused; (3) the extent of the accused's prior experience with the police; (4) the nature and length of the questioning, (5) the length of detention prior to the making of the statement; (6) the explanation of constitutional rights to the accused; (7) whether the accused was injured, intoxicated or in ill health at the time of the making of the statement; (8) whether the accused was deprived of food, sleep or medical attention prior to the making of the statement; (9) whether the accused was physically abused; and (10) whether the accused was threatened with abuse. The ultimate test of admissibility of a confession is whether the totality of the circumstances surrounding the making of the confession indicate that it was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Our review of the lower court record failed to disclose any evidence that defendant was overwrought at the time he made the statement at issue to the police. Because the lower court record reflects that the statement was voluntarily made and does not reflect that defendant was emotionally unstable at the time of the making of the statement, or was otherwise disposed to admit to acts which he did not commit, there is no reasonable probability that the trial court would have had a reasonable doubt

with regard to the defendant's guilt. Thus, defendant has not shown that his trial counsel was ineffective. See *Pickens*, *supra* at 312.

Defendant next argues that trial counsel admitted that defendant was guilty of the lesser included offense of manslaughter and that, consequently, defendant was denied a fair trial. We disagree. Arguing that a defendant is guilty of a lesser included offense of the crime charged does not constitute ineffective assistance of counsel. Such an argument constitutes a trial tactic and will not be second guessed on appeal. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Defendant further claims that the trial court erred in failing to consider the lesser included offense of involuntary manslaughter. We reject defendant's argument.

The finder of fact must address those theories argued by the defendant which were supported by the facts in evidence. *People v Maghzal*, 170 Mich App 340, 347; 427 NW2d 552 (1988). The elements of the crime of involuntary manslaughter are: (1) a death caused by the defendant, (2) without legal justification or excuse, (3) while the defendant was acting in a grossly negligent manner or while committing an unlawful act that was inherently dangerous to human life. *In re Gillis*, 203 Mich App 320, 321; 512 NW2d 79 (1994). However, where the evidence suggests that the criminal act naturally tends to cause death or great bodily harm, a jury instruction on the offense of involuntary manslaughter is inappropriate. *People v Beach*, 429 Mich 450, 477-478; 418 NW2d 861 (1988).

The evidence presented at trial showed that the victim was two-years old at the time of her death and weighed less than a typical child of her age. Furthermore, the injuries which were the cause of her death were the result of defendant having propelled her against a stationary object with considerable force. This evidence suggests that death or great bodily harm was the natural result. Therefore, the trial court was not obligated to address the lesser included offense of involuntary manslaughter in rendering its findings of fact and conclusions of law. See *id*.

Defendant also contends that the trial court made insufficient findings of fact and conclusions of law in convicting defendant. Defendant contends that the trial court failed to adequately articulate its findings regarding defendant's intent to kill, cause great bodily harm, or to knowingly create a situation involving a high risk of death. We disagree.

Factual findings in a bench trial are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). The court need not make specific findings of fact regarding each element of the crime. *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). The court's findings and conclusions as to contested matters are sufficient if brief, definite, and pertinent, without overelaboration of detail or particularization of facts. MCR 2.517(A)(2); *People v Lewis*, 168 Mich App 255, 268; 423 NW2d 637 (1988).

The trial court articulated its findings regarding the weight and credibility of the witnesses as well as the voluntariness of defendant's statement. Moreover, the court made specific findings with regard to

both defendant's intent and the nature of his actions which led to the victim's death. Consequently, we find that the trial court was aware of the issues and correctly applied the applicable law. See *Kemp*, *supra*.

In his next issue, defendant asserts that the trial court erred in scoring Offense Variable (OV) 3 at twenty-five points because the evidence presented at trial failed to show defendant acted with the unpremeditated intent to kill or cause great bodily harm, or otherwise knowingly create a situation where death or great bodily harm was the likely result. Sentencing guidelines scoring will be upheld so long as there is some supporting evidence. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993).

Our review of the record reveals there existed some evidence that defendant acted with the unpremeditated intent to kill, or intent to do great bodily harm, or created a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. Therefore, there is evidence on the record which adequately supports the court's scoring of OV 3.

Finally, defendant argues that the sentence imposed by the trial court was disproportionate to this offense and offender. We disagree. We review the sentence imposed by a trial court for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentence must be proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Defendant's minimum sentence of twenty years falls within the guidelines range of ten to twenty-five years and a sentence imposed within the guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Upon review of the severity and nature of the crime, we conclude that the trial court did not abuse its discretion in sentencing defendant and defendant has failed to overcome the presumption of proportionality.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin

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

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).