STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE GLARIC BOYCE,

Defendant-Appellant.

UNPUBLISHED
January 31, 1997

No. 172492

Detroit Recorder's Court
LC No. 93-007423

Before: Saad, P.J., and Holbrook, Jr., and G.S. Buth,* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to serve twenty to forty years in prison for the murder conviction, consecutive to a mandatory two-year term for the felony firearm conviction. He appeals as of right and we affirm.

Defendant first argues that he was denied a fair trial when the prosecutor impermissibly shifted the burden of proof to the defense during closing argument. Defendant's failure to object to the alleged instance of prosecutorial misconduct precludes appellate review unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant had advanced a defense theory of self-defense at trial, the prosecutor's comments on the validity of that theory did not shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Thus, the prosecutor's closing argument was not improper.

Defendant next argues that he was denied a fair trial when the trial court agreed to give defendant's requested instruction on imperfect self-defense, but then failed to give the instruction. We find no error requiring reversal. Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. *People v Amos*, 163 Mich App 50, 56; 414 NW2d 147 (1987). In Michigan, imperfect self-defense is only available where the defendant would have been

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

entitled to self-defense had he not been the initial aggressor; it has not been recognized where the defendant was mistaken about the *need* to defend himself or about the *amount of force* necessary to defend himself. See *People v Kemp*, 202 Mich App 318, 325; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Although the facts of this case are unusual, we conclude that the record contains insufficient evidence to support an instruction on imperfect self-defense. Indeed, the only direct evidence regarding the circumstances of the shooting came from defendant's police statement, which did not provide factual support for his claim at trial that he was the initial aggressor. Instead, defendant's statement, as well as the preliminary examination testimony of his daughter,[1] indicated that defendant was not the initial aggressor but, rather, that he had responded to the victim's presence in his home with excessive force. *Butler*, *supra* at 67-68. Accordingly, the trial court's failure to instruct the jury regarding imperfect self-defense did not deny defendant a fair trial.

Defendant next argues that he is entitled to a remand for an evidentiary hearing on his claim that he was denied effective assistance of counsel. Defendant specifically argues that (1) counsel failed to allege in the pretrial motion to suppress that the police had coerced his statement with a promise of leniency toward his pregnant daughter, (2) counsel failed to present evidence that corroborated defendant's self-defense claim, and (3) counsel failed to object when the prosecutor elicited prejudicial testimony regarding an unrelated shooting incident. To establish a claim of ineffective assistance of counsel, a defendant has the burden to prove that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's conduct, a reasonable probability existed that the outcome of the trial would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, even assuming that counsel's performance was deficient in some manner as alleged by defendant, we cannot say that defendant suffered outcome determinative prejudice as a result. Overwhelming evidence was presented to support defendant's conviction of second-degree murder, and, indeed, it appears likely that the admission of defendant's police statement may have actually benefited him in front of the jury by presenting his version of events without incurring the risk of testifying on his own behalf. Accordingly, we decline to remand this matter for an evidentiary hearing.

Defendant next argues that the trial court erred in denying his motion to suppress his police statement because it was involuntarily made. When reviewing a trial court's determination of voluntariness of a defendant's statement, this Court examines the entire record and makes an independent determination on the ultimate issue of voluntariness. *People v Robinson*, 386 Mich 551; 194 NW2d 709 (1972); *People v Haywood*, 209 Mich App 217; 530 NW2d 497 (1995). Here, evidence at the evidentiary hearing established that, at the time defendant made his statement, he had been in custody approximately twenty-four hours but had not been questioned extensively until the morning of June 17, 1993. He was fifty-nine years old, with two years of college education. He was a long-term drug addict and had previous experience with withdrawal symptoms. During the interrogation, he was given multiple opportunities to cease the interview, which he repeatedly declined. His statement regarding the need for self-defense was coherent and plausible. Accordingly, under the totality of the circumstances, this Court concludes that defendant's statement was voluntarily made and that the trial court did not err in denying defendant's motion to suppress.

Finally, defendant challenges his twenty-year minimum sentence as either a violation of the life expectancy rule of *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), or as an abuse of discretion under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We find no merit to either challenge. Assuming that *Moore* remains viable precedent, cf. *People v Kelly*, 213 Mich App 8; 539 NW2d 538 (1995), panels of this Court have held that a prison inmate may reasonably be expected to live into his early nineties. See *People v Martinez (After Remand)*, 210 Mich App 199, 203-204; 532 NW2d 863 (1995); *People v Weaver*, 192 Mich App 231; 480 NW2d 607 (1991). Here, defendant will be eligible for parole when he is eighty-one or eighty-two years of age. Accordingly, his sentence does not violate *Moore*. Furthermore, his sentence does not violate the principle of proportionality set forth in *Milbourn*. Defendant's twenty-year minimum is at the low end of the guidelines range and therefore is presumed to be proportional. Neither the fact that defendant was honorably discharged from the U.S. Air Force in 1955 nor the fact that he was employed full-time from 1987 to 1993 constitutes the type of unusual mitigating circumstance that would overcome the presumption of proportionality. Considering defendant's extensive criminal record and the serious nature of this offense—which resulted in a death—we find no abuse of discretion by the sentencing court in imposing a twenty-year minimum sentence.

Affirmed.

/s/ Henry W. Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth

[1] Defendant's daughter testified that, in explaining to her the circumstances of the shooting, defendant said that he was tired of the victim "messing" with defendant's son over money that was owed to the victim and that defendant stated: "'I killed the punk, wrapped him in the paper and took him away.'" Defendant also told his daughter "[t]hat he had to do what he had to do." Although the meaning of this statement is not entirely clear, it could be inferred to mean that defendant intentionally shot the victim and then surreptitiously disposed of the body.