

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ERIC THOMPSON,

Defendant-Appellant.

UNPUBLISHED
February 18, 1997

No. 191136
LC No. 93-010492

Before: Cavanagh, P.J., and Gage and D.A. Burrell,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of voluntary manslaughter, MCL 750.321; MSA 28.553. Defendant was sentenced to ten to fifteen years' imprisonment. We affirm.

First, defendant argues that because he was arrested without an arrest warrant or probable cause, that his statements and the clothing seized from his person should have been suppressed. We disagree. The facts and circumstances were sufficient to warrant a person of reasonable caution to believe that a felony had been committed; thus, there was probable cause to arrest defendant without a warrant. MCL 764.15; MSA 28.874; *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996), cert den ___ US ___; 65 USLW 3488 (1997). Moreover, given the nature of the victim's injuries, defendant's bloody clothing was seizable under the plain view doctrine because the clothing's "incriminating character" was immediately apparent and the officer was lawfully present in a public place when she observed defendant's clothing. See *id.* at 101.

Next, defendant maintains that his statements to the police were not voluntary. Defendant claims that his arraignment was unnecessarily delayed, he was deprived of food and clothing, and he was induced to make his second statement by the officer's indication that he would not be charged with first-degree murder if he gave the second statement. When reviewing a trial court's determination of voluntariness following a *Walker*¹ hearing, this Court will not reverse the trial court's findings unless they are clearly erroneous. *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). Whether a defendant's statement was knowing, intelligent and voluntary is a question of law which the

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

court must determine under the totality of the circumstances including the education, experience and conduct of the defendant, and the credibility of the police. *People v Garwood*, 205 Mich App 553, 557-558; 517 NW2d 843 (1994).

Following the *Walker* hearing, the trial court noted the inconsistencies in defendant's testimony and concluded that it did not believe defendant's testimony. Credibility is crucial in determining a defendant's level of comprehension and the trial judge is in the best position to make this assessment. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996) (Boyle, J.). After a thorough review of the record, we conclude that the trial court did not clearly err in finding that defendant voluntarily, knowingly, and intelligently waived his rights. See *Johnson*, *supra*.

Defendant also asserts that the trial court erred in refusing to instruct the jury on the lesser offenses of involuntary manslaughter, assault with intent to commit great bodily harm less than murder, aggravated assault, and assault and battery. We disagree. An instruction on the lesser included offense of assault with intent to do great bodily harm less than murder was unwarranted because defendant failed to present evidence that his admitted acts were not a legally recognizable cause of the victim's death. Cf. *People v Bailey*, 451 Mich 657, 679-680; 549 NW2d 325 (1996). Similarly, since there was uncontested evidence that defendant's acts resulted in the victim's death, there was no justification for instructions on aggravated assault or assault and battery. See *id.* at 671-672. Finally, the evidence presented could not have supported a conviction of involuntary manslaughter; thus, the court did not err in refusing to give the requested instruction to the jury. See *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

Defendant contends that the trial court erred in denying defendant's motion for a directed verdict of acquittal on the second-degree murder charge. We disagree. The elements of second-degree murder are: (1) that a death occurred, (2) that it was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse. *People v Lewis*, 168 Mich App 255, 268; 423 NW2d 637 (1988). Malice, the requisite mental state for murder, consists of the intent to kill, to cause great bodily harm, or 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. *Id.* at 270.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of second-degree murder were established beyond a reasonable doubt. See *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). Defendant admitted to the police that he brutally beat the victim about her head with his fists approximately five or six times, and in addition grabbed her by the throat, on the night of the incident. The victim's head injuries caused severe swelling in the brain, and the medical examiner concluded that the victim died as a result of the head injuries and the stab injuries. Even if the trier of fact were to conclude that defendant did not stab the victim, there was sufficient evidence for the trier of fact to conclude that defendant intended to inflict great bodily harm when he beat the victim's head five or six times, that there was no justification or excuse for defendant's actions, and that the victim died as a result of her head injuries. Thus, the court did not err in denying defendant's motion for a directed verdict.

Next, defendant maintains that the court's denial of defendant's motion for a mistrial was an abuse of discretion. We disagree. Although the prosecutor improperly threatened to charge defendant's alibi witness with perjury just prior to his testimony, see *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992), the error was not of such magnitude that the granting of a mistrial was a manifest necessity, see *People v Robbins*, 132 Mich App 616, 619-620; 347 NW2d 765 (1984).

Defendant further contends that the prosecutor's comments during his opening statement and closing argument denied him a fair trial. Defendant raises seven separate claims of error. However, defendant failed to object to the alleged misconduct or to request a curative instruction. Therefore, our review of the issue is precluded, unless the conduct was so egregious that no curative instruction could have removed any prejudice to defendant or if manifest injustice would result from our failure to review the alleged misconduct. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

Generally, prosecutors are accorded great latitude regarding their argument and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor may comment upon his own witness' credibility to the jury where there is conflicting evidence and the question of defendant's guilt or innocence depends on which witness is believed. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992). Considering the prosecutor's opening statement and closing argument in their entirety, we find no error requiring reversal and conclude that no manifest injustice would result from our failure to further review these issues. See *Paquette, supra* at 341-342; *People v Hedelsky*, 162 Mich App 382, 386; 412 NW2d 746 (1987).

Finally, defendant argues that he was denied effective assistance of counsel when trial counsel failed to raise the issue of the illegality of defendant's arrest in his motion to suppress defendant's statements and his clothing, and when counsel failed to object to the prosecutor's alleged improper comments. After a thorough review of the record, we conclude that defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness, or that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US ___; 115 S Ct 923; 140 L Ed 2d 802 (1995).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Daniel A. Burress

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).