

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NANCY LOUISE ABERNATHY,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 204507

Kent Circuit Court

LC No. 95-003102 FC

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from her jury convictions of first-degree, premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for the shooting death of her daughter-in-law. Defendant was sentenced to mandatory life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

I

First, defendant claims that she was denied a fair trial due to defense counsel's decision to present two purportedly inconsistent defenses at trial: one, that the murder was committed by an unknown intruder, and two, that if defendant did commit the murder she was not guilty by reason of insanity. Defendant asserts that, while defense counsel would not have been ineffective if he had chosen one defense or the other, she was prejudiced by the presentation of both defenses.

We agree with the trial court's observation, in its denial of defendant's motion for a new trial on this basis, that the instant case represents the "flip side" of *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995), in which the Supreme Court held that trial counsel was not ineffective for choosing between two weak defense strategies, neither of which had a significant likelihood of success, and in which it was not shown that counsel's choice of defense significantly affected the outcome of the trial. Here, defendant argues that defense counsel is ineffective for choosing not one of two options, but both of two options. We agree with the trial court's conclusion that the two defenses presented here were not, in fact, inconsistent given the unique facts in this case. Where the murder weapon was never

recovered and where, absent defendant's admissions, the evidence of her guilt was mostly circumstantial, it was possible that the jury would find the physical evidence insufficient to show defendant's guilt. Furthermore, given defendant's mental health history, it was possible for the jury to reject defendant's admissions based on a finding that she was insane and find that defendant did not murder the victim. Defendant has not shown that counsel was deficient in choosing to present both defenses and has not shown the requisite prejudice, i.e., that the choice of one or the other defense would have had a reasonable probability of affecting the outcome of the trial. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant also did not present any facts which, if established at a hearing, would have demonstrated the requisite prejudice to prevail on her claim of ineffective assistance of counsel. Therefore, defendant has not shown that she was prejudiced as a result of the trial court's denial of her request for an evidentiary hearing. It is apparent that defense counsel's decision to present the two simultaneous defenses was a soundly based tactical and strategic decision which, although ultimately unsuccessful, did not fall below an objective standard of reasonableness and did not constitute the ineffective assistance of counsel. *Strickland, supra; Pickens, supra.*

II

Second, defendant claims that the trial court erred when it refused to instruct the jury on the crimes of voluntary and involuntary manslaughter. We disagree.

Voluntary and involuntary manslaughter are cognate lesser included offenses of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Heflin*, 434 Mich 482, 497; 456 NW12d 10 (1990); *People v Beach*, 429 Mich 450, 476-478; 418 NW2d 861 (1988). When a cognate lesser included offense instruction is requested, the court must examine the evidence presented at trial to determine if it would support conviction of the lesser offense. *People v Bailey*, 451 Mich 657, 669-670; 549 NW2d 325 (1996); *Pouncey, supra* at 387; *Beach, supra* at 463-465, 480. A theory based on speculation, rather than evidence on the record, is insufficient to support a request for a cognate lesser included offense instruction. *Bailey, supra* at 673, 681; *Beach, supra* at 479-480.

Defendant offers nothing more than sheer speculation that it was *possible* that she intentionally killed the victim but did so in the heat of passion. See *Pouncey, supra* at 388-390. However, the standard involves a determination whether the evidence *presented on the record* would support a conviction on the requested cognate lesser included offense. *Beach, supra* at 479-480; *Bailey, supra* at 679-682. The necessary evidence was not presented in this case to support the requested instruction on voluntary manslaughter.

Similarly, defendant's argument regarding involuntary manslaughter consists of pure speculation that, based upon her past behavior of making threats but not carrying them out, she may have accidentally carried out a threat to kill the victim. However, where there was no evidence presented of an accidental killing, the trial court did not err in declining defendant's request that the jury be instructed

on this offense. *Beach, supra* at 479-480. See also *People v Mills*, 450 Mich 61, 81-82; 537 NW2d 909, modified 450 Mich 1212 (1995).

III

Third, defendant claims that the trial court erred in refusing to suppress various statements made by her. We conclude that the challenged statements were all properly admitted at trial.

Generally, all relevant evidence is admissible, MRE 402, *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998), and the prosecution may offer all relevant evidence, subject to MRE 403, on every element of the crime charged. *Mills, supra* at 71.

In the instant case, the intent of defendant was directly at issue because it was an element of the charged offense of first-degree, premeditated murder. MCL 750.316; MSA 28.548. The challenged statement made to Lisa Carpenter was relevant and material to show defendant's long established motive, intent and plan to kill the victim. MRE 401, MRE 803(3). See *Mills, supra*; *People v Fisher*, 449 Mich 441, 452-453; 537 NW2d 577 (1995). The statement was not unfairly prejudicial pursuant to MRE 403 merely due to the passage of time because the statement was consistent with subsequent, similar statements made by defendant regarding her intense dislike of the victim and her intent to kill her. The court did not abuse its discretion in admitting defendant's statement to Carpenter.

In addition, we agree with the trial court's determination that defendant's statements to the police and to Tonya Bier and Cecilia Logins were not involuntary. In our examination of the voluntariness of statements, we are to examine the entire record and make an independent determination but are to give deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998); *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J), 44 (Weaver, J); 551 NW2d 355 (1996). After engaging in such a review, we agree with the trial court that defendant's statements were not involuntary, were reliable, and were relevant and admissible at trial.

Affirmed.

/s/ Gary R. McDonald

/s/ David S. Sawyer

/s/ Jeffrey G. Collins