

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD LEWIS, JR.,

Defendant-Appellant.

UNPUBLISHED

July 17, 2003

No. 240011

Wayne Circuit Court

LC No. 01-008016

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twelve to twenty years' imprisonment on the murder conviction and to a consecutive two-year prison term on the felony-firearm conviction. We affirm.

Defendant first argues that his statement to the police should have been suppressed at trial because it was involuntarily made, and thus the trial court erred in denying his *Walker*¹ motion to suppress the statement. We disagree.

Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, when addressing a motion to suppress a statement made to authorities, it must be determined, based on the totality of the circumstances, whether the defendant's statement was voluntary, and whether defendant made a voluntary, knowing, and intelligent waiver of his constitutional rights.² *People v Daoud*, 462 Mich 621, 630-634; 614 NW2d 152 (2000). Here, defendant

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

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

² These rights include, in part, the right to be free from police coercion with respect to a confession, the right to remain silent, and the right to the presence of an attorney, which rights are encompassed by constitutional provisions concerning due process and self-incrimination. *People v Daoud*, 462 Mich 621, 630-633; 614 NW2d 152 (2000), quoting *Miranda v Arizona*, 384 US 436, 467, 478-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and citing *Brown v Mississippi*, 297 US 278; 56 S Ct 461; 80 L Ed 2d 682 (1936).

specifically frames the issue as whether defendant's statement was involuntarily made in light of alleged police deception about the availability of an attorney. In the body of defendant's appellate brief, he also argues, concomitantly, that his *Miranda* waiver was not voluntarily made. Additionally, defendant suggests that the waiver of his constitutional rights to an attorney was not made knowingly.

Although we engage in de novo review of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker* hearing unless those findings are clearly erroneous. *Daoud, supra* at 629, quoting *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996); see also *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *DeLisle, supra* at 719. The trial judge is in the best position to assess the crucial issue of credibility. *Daoud, supra* at 629.

A confession or waiver of constitutional rights must be made voluntarily and freely without compulsion, coercion, intimidation, deception, or inducement of any sort, *id.* at 631-633, and the confession must be the product of an essentially free and unconstrained choice by its maker without the accused's will being overborne and his capacity for self-determination critically impaired, *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). In *People v Snider*, 239 Mich App 393, 417-418; 608 NW2d 502 (2000), this Court discussed the following principles to be utilized in determining whether a criminal defendant's statement and waiver has been voluntarily given:

In general, statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Michigan Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

“the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.”

No single factor is determinative, and “[t]he ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.” *Cipriano, supra* at 334.

This issue focuses on witness credibility. Investigator Barbara Simon testified that defendant made no request for an attorney. Moreover, she testified that she had defendant read aloud his constitutional rights from a document, including the right to an attorney, and he

indicated that he understood his rights and waived his rights. Defendant then signed a constitutional rights waiver form and placed his initials by every right being waived. Defendant, on the other hand, insisted that he requested an attorney several times, and that he was told that he was not provided a lawyer because one was not available to him. Great deference is afforded to the trial court's findings, with respect to the demeanor of witnesses and witness credibility. *Snider, supra* at 418. There was ample evidence to support the trial court's conclusion that defendant's confession and waiver of his constitutional rights was voluntarily given. We note that defendant has an extensive history with the criminal justice system, thus suggesting experience and knowledge of procedures and constitutional rights. Further, there is no indication in the record that defendant was mentally incapable of understanding his rights; therefore, there is no basis to find that his waiver of rights was not made knowingly and intelligently. Also, there was no evidence of police coercion or intimidation. Rather, the evidence indicated that defendant made a free and unconstrained choice to render a statement and waive his rights. Accordingly, the trial court's findings are not clearly erroneous, and there was no error in allowing the jury to hear the statement.³ Moreover, considering the extensive evidence that basically corroborated defendant's statement to the police, we find that assuming error in allowing admission of the statement, it was harmless. *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997).

Next, defendant argues that he was denied the effective assistance of counsel at trial. We disagree.

In order to preserve issues regarding the effectiveness of counsel, the defendant should bring a motion in the trial court for a new trial or for a *Ginther*⁴ hearing. *People v Sabin (On Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Although defendant apparently brought a motion for a new trial, his motion did not address the effectiveness of trial counsel, and defendant failed to bring a motion for a *Ginther* hearing. Accordingly, this issue has not been properly preserved for appellate review.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed de novo; however, a trial court's findings of fact are reviewed for clear error. *Id.* Based on defendant's failure to move for a new trial in the lower court, this Court's review is limited to mistakes apparent on the record. *Sabin, supra* at 659. For issues regarding the effective assistance of counsel, a defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing 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. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "Decisions regarding what evidence to

³ To the extent that defendant may be claiming that he was denied his Fifth Amendment right to counsel and that the statement should be suppressed predicated on denial of that right that was allegedly invoked, we conclude that the record shows a valid waiver of such right.

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77.

Defendant first contends that defense counsel was ineffective because he did not call defendant's girlfriend as a witness. The failure to call a certain witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant contends that the girlfriend's testimony was necessary because it was important for her to present her version of the events surrounding the victim's death. Defendant has failed to demonstrate in any meaningful manner how the absence of the testimony has deprived him of a substantial defense. Defense counsel's decisions regarding what evidence to present and whether to call or question witnesses is presumed to be trial strategy, and that presumption has not been overcome.

Defendant also contends that defense counsel was ineffective because he failed to object to certain testimony that demonstrated that the victim chased defendant onto his porch with a knife in his hand. Defendant's argument is unclear regarding how he was prejudiced from the elicitation of such testimony. Instead, such evidence appears to assist defendant's theory of self-defense or provocation. We find no prejudice.

Defendant further argues that defense counsel was ineffective because he did not discuss his trial strategy with defendant. Based on the existing record, we are unable to determine whether defense counsel failed to discuss his strategy with defendant, or, assuming failure, whether there was any prejudice. Defendant is unable to overcome the presumption that counsel effectively represented him at trial.

Finally, it appears that defendant argues that defense counsel was ineffective because he did not clarify the relationship between the victim and the prosecution's "eye witnesses," which would have shown a motivation to lie. At trial, each of the eyewitnesses testified regarding their relationship with each other, with the victim, and with defendant. Accordingly, defense counsel was not ineffective for failing to elicit further testimony regarding the relationship between the eyewitnesses, the victim, and defendant. To the extent that defendant is making additional claims predicated on ineffective assistance of counsel, we are unable to discern the arguments; therefore, they have been waived for failure to adequately brief. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Next, defendant argues that the prosecutor committed misconduct because the prosecutor referred to defendant as "controlling," described defendant as the "jury, judge and executioner," and impermissibly vouched for a witness' credibility. We disagree. As a preliminary matter, we note that defendant has failed to detail in any manner how the prosecution allegedly vouched for a witness' credibility, therefore, we deem that particular argument waived.⁵

⁵ Defendant also apparently argues that the prosecutor committed misconduct by failing to call defendant's girlfriend to the stand. Defendant fails to cite any authority supporting this position, (continued...)

In order to preserve a prosecutorial misconduct issue for appellate review, a defendant must timely and specifically object to the alleged improper conduct. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In the instant case, defense counsel made no objection to the alleged improper conduct. Accordingly, this issue has not been properly preserved for appeal.

This Court reviews allegations of prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *Id.* Generally, prosecutors are given great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.* “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Leshaj, supra* at 419.

We find that defendant has failed to demonstrate a plain error affecting his substantial rights. First, we note that it is clear that the prosecutor’s word selection related to his theory of the case and the evidence presented. “A prosecutor need not confine argument to the ‘blandest of all possible terms,’ but has wide latitude and may argue the evidence and all reasonable inference from it.” *People v Kris Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Further, any prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction. Hence, no error requiring reversal is found. Finally, the trial court instructed the jury that the lawyer’s statements and arguments were not evidence, further diminishing any prejudicial effect the prosecutor’s statements may have had on the jury. Accordingly, defendant has failed to demonstrate a plain error affecting his substantial rights.

Finally, defendant argues that there was insufficient evidence to support his conviction for second-degree murder, and that he should have been found guilty of voluntary manslaughter or even a lesser charge, rather than second-degree murder. We disagree. “When reviewing a sufficiency of the evidence argument in a criminal case, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Alter*, 255 Mich App 194, 201-202; 659 NW2d 667 (2003).

The offense of second-degree murder consists of the following elements: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). . . . The element of malice is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 464. Malice for second-degree murder can be inferred from evidence that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. *Goecke, supra* at 466. [*People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).]

(...continued)

and we thus reject the argument.

Defendant's argument revolves around the fourth element, which focuses on the absence of justification or excuse. Defendant argues that there was sufficient provocation to reduce the crime of second-degree murder to voluntary manslaughter.⁶ The question is whether there was sufficient evidence, when viewed most favorably to the prosecutor, to find that second-degree murder was committed, and that adequate provocation was lacking. There was sufficient evidence that defendant lacked adequate provocation for shooting the victim.

"The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation must be adequate, such as to cause a reasonable person to lose control. *Id.* The determination of what constitutes reasonable provocation is a question of fact for the factfinder. *Id.* at 390.

Here, there was testimony that defendant and the victim got into an argument, during which the victim and defendant pushed each other, and the victim eventually pulled out a knife. There was also evidence that defendant then told his girlfriend to get his "stuff," at which time defendant went inside his house. There was evidence presented that the victim did not follow defendant into the house, but rather, put the knife away and returned across the street near his car. Defendant then left his house carrying a gun, walked across the street, and approached the victim with a gun in his hand. Defendant "clicked" the gun once, but the gun did not fire, and the victim swung at defendant with his fists. Defendant then fired the gun, and shot the victim in the chest. There was testimony that the victim did not have anything in his hands when defendant approached and shot him. Such evidence is sufficient for the jury to reject defendant's theory that there was adequate provocation or that the "provocation" was reasonable to invoke defendant's act of shooting the victim, as defendant retreated from the initial confrontation to apparent safety, and later approached the victim, who no longer brandished a knife, and shot him in the chest. Accordingly, there was sufficient evidence to support defendant's conviction for second-degree murder.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper
/s/ Charles L. Levin

⁶ The jury was instructed on voluntary manslaughter.