

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK LEROY PARKER, JR.,

Defendant-Appellant.

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UNPUBLISHED

February 15, 2007

No. 263276

Oakland Circuit Court

LC No. 2003-188331-FC

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree murder, MCL 750.317. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 50 to 100 years' imprisonment. We affirm.

Defendant was convicted of killing Sandra Brady, a homeless woman and alcoholic who defendant allowed to stay in his apartment in 2000. During that time, defendant acknowledged to a friend that he physically abused Brady.

On August 9, 2000, defendant frantically knocked on a neighbor's door and asked the neighbor to call "911." Two people at the neighbor's apartment, who were trained in cardiopulmonary resuscitation ("CPR"), went to defendant's apartment to offer aid and found Brady lying naked on a bed, not breathing. They performed CPR until an ambulance arrived to take Brady to a hospital. Brady arrived at the hospital with numerous bruises of varying ages across her chest, abdomen and side, swelling around her face, and a fractured arm and nose. She was immediately placed on a ventilator but, was determined to be in an irreversible coma with virtually no chance of recovery and, six days later, was removed from life support because of the severity of her injuries. She died shortly thereafter. An autopsy revealed that Brady died because her brain was deprived of oxygen due to an obstruction of her airway, which the medical examiner opined was sustained in an assault.

I

Defendant first argues that he was prejudiced by prearrest delay in charging him in this matter, and that his rights under the statutory 180-day rule, MCL 780.131, and to a speedy trial, US Const, Ams VI and XIV; Const 1963, art 1, § 20, were also violated. We disagree.

We first consider defendant's claim that dismissal is required because of prearrest delay. Although Brady died in August 2000, defendant was not charged in this matter until October 2002, and his trial did not begin until April 2005. Charges against a defendant should be dismissed if there is an unjustified delay between the commission of the offense and the filing of an information if the defendant is substantially prejudiced in his right to a fair trial. *People v Ervin*, 163 Mich App 518, 520; 415 NW2d 10 (1987). This right is based on the speedy trial right under the Due Process Clauses of the federal and state constitutions, US Am XIV, Const 1963, art 1, § 17. *People v Nuss*, 405 Mich 437; 276 NW2d 448 (1979). "Michigan applies a balancing test to determine if a prearrest delay requires reversing a defendant's conviction because the state may have an interest in delaying a prosecution that conflicts with a defendant's interest in a prompt adjudication of the case." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Before dismissal may be granted due to prearrest delay, there must be actual and substantial prejudice to the defendant's right to a fair trial and a lack of showing that the delay was justified. *People v Adams*, 232 Mich App 128, 134; 591 NW2d 44 (1998). To be substantial, the prejudice to the defendant must have impaired his ability to defend against the state's charges against him such that the outcome of the case was likely affected. *Adams, supra* at 134-135. Proof of "actual and substantial" prejudice requires more than just generalized allegations. *Id.*

The burden is on the defendant to come forward with evidence of prejudice from the delay, while the burden is on the prosecution to persuade the reviewing court that any delay was not deliberate and did not prejudice the defendant. *Cain, supra* at 108. The defendant must first establish prejudice. Then the prosecution bears the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice results. *Id.* at 109.

While there appears to be no justification for the delay in charging defendant in this case, defendant has not established that he was prejudiced by the delay. Defendant argues that he was prejudiced because he was precluded from establishing at trial that his former neighbors, the Nazarkos, who had since moved away and could no longer be located, did not hear any fighting in defendant's apartment. However, the detective who investigated this matter testified at trial that he had contacted the Nazarkos and other residents, and that only a few identified residents, which did not include the Nazarkos, reported hearing anything from defendant's apartment on the night of the incident. Thus, the jury was aware that the Nazarkos had been contacted, and that they were not among the group of residents who reported hearing something from defendant's apartment. Therefore, defendant has not established that he was prejudiced at trial by the failure to locate these witnesses and, accordingly, has not shown that dismissal was warranted due to prearrest delay.

In addition, defendant's claims that his constitutional right to a speedy trial and his rights under the 180-day rule were violated are without merit, as we conclude that defendant waived any alleged violation. At defendant's preliminary examination, defendant's attorney affirmatively stated that defendant was waiving any right to a speedy trial or a trial within 180 days. Once a defendant waives his rights under a rule, he may not then seek appellate review of a claimed deprivation of those rights because his waiver has extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

“Waiver is the intentional relinquishment or abandonment of a known right or privilege.” *People v Cleveland Williams*, 475 Mich 245, 260; 716 NW2d 208 (2006). “Waiver consists of (1) specific knowledge of the constitutional right and (2) an intentional decision to abandon the protection of the constitutional right.” *Id.* at 261. In this case, defense counsel’s statements were sufficient to show awareness of defendant’s rights under the 180-day rule and to a speedy trial and an intentional decision to waive those rights. See, e.g., *People v Crawford*, 161 Mich App 77, 83; 409 NW2d 729 (1987), remanded on other grounds 437 Mich 856 (1990). Accordingly, defendant is precluded from now asserting a violation of those rights on appeal.

## II

Next, defendant argues that he was deprived of both his right to counsel at a critical stage of the proceedings and his right to the effective assistance of counsel. Defendant raised the later argument before the trial court and requested an evidentiary hearing, but the court concluded that an evidentiary hearing was not necessary, opining that it was satisfied that all three of defendant’s defense attorney’s conscientiously attempted to represent him to the best of their abilities.

Defendant first argues that his attorney’s absence at four pretrial hearings deprived him of the right to counsel at a critical stage of the proceedings. “It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal.” *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). A critical stage generally means “a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.” *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). “[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” *People v Kurylczyk*, 443 Mich 289, 296; 505 NW2d 528 (1993), quoting *United States v Wade*, 388 US 218, 226; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

In this case, none of the four hearings at which counsel was absent involved a critical stage of the proceedings. The court adjourned the first two hearings and only discussed or set trial dates at the latter two. Counsel’s absence from the pretrial hearings did not affect defendant’s right to a fair trial. Defendant has not shown that he was deprived of the right to counsel at a critical stage of the proceedings. *Kurylczyk, supra*.

We also reject defendant’s argument that he was completely deprived of the right to counsel due to his attorneys’ failure to investigate this matter. Critical stages are not limited to formal appearances before a judge and can include pretrial preparation. *Mitchell v Mason*, 325 F3d 732, 743 (CA 6, 2003). The pretrial period is a critical stage because it encompasses counsel’s duty to investigate the case. *Id.* A complete deprivation of counsel at the pretrial stage involving trial preparation generally arises from counsel’s failure to consult with the defendant. *Id.* at 743-744. In *Mitchell*, the Court held that the defendant was denied the assistance of counsel during the pretrial stage because his attorney consulted with him for only six minutes over three meetings and was also suspended from the practice of law during the month preceding trial.

Here, however, defendant admitted that he met and consulted with his trial attorney for at least two hours, not counting discussions at court hearings or through correspondence. This case is thus distinguishable from *Mitchell*. Defendant has failed to show a complete deprivation of the right to counsel during the pretrial stage.

Defendant also argues that counsel was ineffective. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient that counsel did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the point where the defendant was deprived of a fair trial and a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also show "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.*

Claims of ineffective assistance of counsel involve a mixed question of law and fact. The trial court must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews the trial court's factual findings for clear error, and the trial court's constitutional determinations are reviewed de novo.

The primary basis for defendant's claim of ineffective assistance of counsel is his claim that his attorneys failed to investigate all relevant matters. The failure of counsel to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). It is counsel's duty to make an independent examination of the facts, laws, pleadings and circumstances involved in the matter and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004) (opinions by Kelly, J., and Taylor, J.). A sound trial strategy is one based on investigation and supported by reasonable professional judgments. *Id.* "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this regard, defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id.*

In his motion in the trial court, defendant asserted that all three of his attorneys failed to investigate his case in that they did not (1) seek the appointment of an independent pathologist regarding the cause of death, (2) use an investigator to interview Mike Knoke, (3) use an investigator to interview the apartment manager and other residents of defendant's apartment complex, and (4) look into Brady's prior medical records. Defendant, however, never provided any offer of proof to factually support his claim that an investigation of these matters would have yielded favorable evidence.<sup>1</sup> Furthermore, in the absence of an appropriate offer of proof, the trial court did not err by failing to conduct an evidentiary hearing on this issue.

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<sup>1</sup> Indeed, defendant now acknowledges on appeal that Knoke could not have provided any  
(continued...)

A defendant who requests the right to an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), should ordinarily be granted the opportunity to make a separate record to support his claims. However, a defendant is obligated to make some showing that a hearing is necessary when moving for a new trial. Here, the required showing was not made. We therefore also decline defendant's request to remand this case for an evidentiary hearing. This Court will not require a trial court to conduct a hearing regarding the effective assistance of counsel without a proper offer of proof. See, e.g., *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

### III

Defendant next argues that the trial court erred by denying his request for a mistrial after the jury sent out a note indicating that there was a problem with one juror who was refusing to abide by the court's instructions, refused to discuss the evidence, and had made up his or her mind and could not be swayed to change it. Defendant argues that a mistrial was required because the jury improperly revealed that it was split 11-1 in favor of second-degree murder and the holdout juror was accused of misconduct. We disagree.

As our Supreme Court explained in *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002):

The trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court. *Arizona v Washington*, 434 US 497, 510; 98 S Ct 824; 54 L Ed 2d 717 (1978). "At most, . . . the inquiry . . . turns upon determination whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." [*People v*] *Duncan*, [373 Mich 650], 661[]; 130 NW2d 385 (1964)] (emphasis supplied).

A trial court should not inquire into how a jury stands in its deliberations in terms of the vote division. *Burton v United States*, 196 US 283, 307-308; 25 S Ct 243, 250; 49 L Ed 482 (1905). An inquiry into the numerical division of the jury tends to be coercive. *People v Albert Wilson*, 390 Mich 689, 691-692; 213 NW2d 193 (1973).

In this case, the trial court never inquired into the numerical division of the jury or the status of the jury's voting. After reading the jury's note on the record, the court indicated that it would bring out the jury read them "the Allen charge."<sup>2</sup> Before it could do so, defendant moved for a mistrial because it appeared that the jury was hung. The court stated that it would give "the Allen charge" instead. The jury was then instructed to resume deliberations to try to reach a verdict, consistent with CJI2d 3.12. The court thereafter explained to the parties that if the jury came back in an hour or two and said it still could not reach a verdict, it would revisit whether to grant a mistrial. The jury reached a verdict less than two hours later.

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relevant information about this crime.

<sup>2</sup> *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

Further, although the jury revealed a problem with a single juror, including the juror's refusal to follow the court's instructions on second-degree murder, the jury never revealed the status of its vote. Thus, there is no merit to defendant's argument that a mistrial should have been granted because either the jury or the trial court improperly revealed the voting status of its deliberations.

Under the circumstances, the trial court did not abuse its discretion by electing to instruct the jury consistent with CJI2d 3.12, in lieu of immediately granting a mistrial. The jury's note indicated that one juror was refusing to follow the court's instructions in attempting to arrive at a verdict. The court's instruction reinforced that all jurors were required to follow the court's instructions and consider the opinions of the other jurors during deliberations. The instruction was appropriate under the circumstances in lieu of immediately declaring a mistrial.

#### IV

Defendant next argues that his attorney was ineffective for not requesting an instruction on involuntary manslaughter based on gross negligence as a lesser-included offense. We disagree. Because defendant did not raise this issue in the trial court, our review is limited to mistakes apparent from the record. *People v Matuszak*, *supra*, 263 Mich App at 48.

Defendant argues that his attorney should have requested an instruction for involuntary manslaughter based on gross negligence, as provided in CJI2d 16.10 and 16.18. "Manslaughter is a necessarily included lesser offense of murder." *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006). Therefore, when a defendant is charged with murder, an instruction for voluntary or involuntary manslaughter must be given if supported by a rational view of the evidence. *Id.* at 137-138.

Involuntary manslaughter can be based either on an intent to injure or gross negligence. *Id.* at 138. CJI2d 16.10 includes both forms of involuntary manslaughter. In this case, the trial court instructed the jury on involuntary manslaughter involving assault and battery, or an intent to injure. In contrast, gross negligence is not based on an intent to injure, but rather the willful failure to exercise ordinary care to avoid injury to another.

Here, a rational view of the evidence did not allow the jury to find that defendant could have caused Brady's death through gross negligence while having anal sex with the victim, as defendant now claims. A rational view of the facts supported an instruction based upon intent to injure because there was evidence that defendant assaulted the victim, and it was up to the jury to determine defendant's state of mind for purposes of determining if he was guilty of either involuntary manslaughter, second-degree murder, or first-degree murder. Because the evidence did not support an instruction for involuntary manslaughter based on gross negligence, defense counsel was not ineffective for failing to request the instruction.

#### V

Defendant next argues that the trial court erred by denying his request for a jury instruction consistent with CJI2d 16.15, which provides:

[There may be more than one cause of death.] It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [name deceased] was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural or necessary result of the defendant's act.

The use note for CJI2d 16.15 explains that it is intended for cases in which there is an issue whether the defendant's actions caused the death or whether the death was caused by some intervening act. CJI2d 16.15 embodies the rule that only an intervening act that is the sole cause of harm will allow a defendant to be found not guilty. *People v Bailey*, 451 Mich 657, 677-678; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996).

In the trial court, defendant did not offer any factual argument explaining why he believed an instruction based on CJI2d 16.15 was appropriate in this case. It appears that defendant requested the instruction because the victim died after she was removed from life support. But death following a victim's removal from life support is not an intervening act. *People v Bowles*, 234 Mich App 345, 349-351; 594 NW2d 100 (1999), aff'd 461 Mich 555 (2000).

On appeal, defendant indicates the instruction was appropriate based upon Brady's acute alcoholism, inept performance of CPR, lack of evidence that Brady was strangled, and the possibility of accidental self-smothering. However, the evidence eliminated Brady's alcoholism and improper performance of CPR as causes of her death. To the extent they could be considered contributing factors in her death, this was insufficient to support an instruction based on CJI2d 16.15. *Bailey, supra*. Defendant's argument that there was no physical evidence that Brady was strangled does not support defendant's claim that an instruction based on CJI2d 16.15 was warranted. Rather, this argument only implicates whether there was evidence that defendant caused Brady's death, not whether an intervening event caused her death. Finally, the evidence did not support defendant's claim that Brady asphyxiated herself.

For these reasons, the trial court did not err in denying defendant's request for an instruction based on CJI2d 16.15. We similarly reject defendant's claim that the trial court erred by failing to give this instruction in response to the jury's notes after the jury began deliberations. Nothing in the jury's notes indicated that the jury was confused about a possible intervening cause of death and, in any event, the evidence did not support the instruction. Further, because the trial court considered the matter and properly concluded that an instruction based on CJI2d 16.15 was not warranted, there is no basis for concluding that defense counsel was ineffective for not joining in defendant's pro se request for that instruction, or that the prosecutor engaged in misconduct in opposing defendant's request.

## VI

Defendant next argues that the trial court erred by failing to include "moral certainty" language in its jury instruction defining "reasonable doubt." We disagree.

The trial court instructed the jury on reasonable doubt in accordance with CJI2d 3.2(3), which adequately defines the concept of "reasonable doubt." *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002); *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502

(2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). Notably, the United States Supreme Court has not approved the use of the “moral certainty” language in a state court’s instructions on reasonable doubt, and has noted that the “moral certainty” language is no longer favored. *Victor v Nebraska*, 511 US 1, 16; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

## VII

Defendant also argues that trial counsel was ineffective for not doing more to produce his former neighbors, the Nazarkos, at trial. Defendant asserts that these witnesses could have testified that they did not hear anything in defendant’s apartment on the night Brady was injured. But even if counsel was deficient in this respect, defendant has not established resulting prejudice. As previously discussed in part I, defense counsel was able to establish through his questioning of the investigating officer that the Nazarkos and other residents of defendant’s apartment complex were contacted, and that only those residents who testified at trial reported hearing anything from defendant’s apartment. Because the jury was aware that the Nazarkos had been contacted and were not among the group of residents who reported hearing something from defendant’s apartment, we find no merit to this issue.

## VIII

Defendant next argues that his rights to a fair investigation and due process were violated by the failure to locate and produce certain *res gestae* witnesses at trial. We find no merit to this argument.

Defendant relies on Const 1963, art 1, § 17, which provides:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. *The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.* [Emphasis added.]

The Convention Comment regarding the fair and just treatment clause provides:

This is a revision of Sec. 16, Article II, of the present [1908] constitution. The second sentence incorporates a new guarantee of fair and just treatment in legislative and executive investigations. This recognizes the extent to which such investigations have tended to assume a quasi-judicial character.

The language proposed in the second sentence does not impose categorically the guarantees of procedural due process upon such investigations. Instead, it leaves to the Legislature, the Executive and finally to the courts, the task of developing fair rules of procedure appropriate to such investigations. It does, however, guarantee fair and just treatment in such matters.

By its terms, the fair and just treatment clause applies only to legislative and executive investigations and hearings.

Furthermore, defendant has not shown any violation concerning the production of res gestae witnesses based on MCL 767.40a. Before 1986, prosecutors had a duty to locate, list, and produce at trial all persons who might be res gestae witnesses. *People v Cook*, 266 Mich App 290, 294; 702 NW2d 613 (2005). However, the statute was amended in 1986, and prosecutors no longer have a duty to produce all res gestae witnesses. Instead, they are only obligated to provide notice of known witnesses and offer reasonable assistance in locating witnesses at a defendant's request. *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003). Only through a request for assistance is any duty of the police to locate witnesses triggered. *Cook, supra* at 295. In this case, there is no dispute that defendant did not request police assistance in locating any witnesses. Thus, defendant cannot establish a violation based on MCL 767.40a.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Alton T. Davis

/s/ Deborah A. Servitto