

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SHAWN POOLE,

Defendant-Appellant.

UNPUBLISHED

March 17, 2015

No. 319911

St. Clair Circuit Court

LC No. 13-001620-FC

Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 25 to 50 years' imprisonment. For the reasons below, we affirm.

This case arises out of an altercation that occurred at a social gathering on June 7, 2013 between defendant and the victim, David Long. As a result of the incident, Long was severely cut in the neck, and died of blood loss at the hospital shortly thereafter. Testimony at trial revealed that, immediately after he was cut, Long stated, “[H]e cut me,” and “Mike just cut me.” One of defendant’s roommates, Damia Johnson, testified that when defendant returned to their apartment after the incident, he admitted cutting Long, but stated, “I know I was wrong, I didn’t cut him that deep, he w[ill] be okay, I did the crime, I’ll do the time.” At trial, defendant testified that he pushed Long’s face, but denied cutting him.

Defendant first argues that the prosecutor failed to present sufficient evidence of malice to support his second-degree murder conviction. We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). When reviewing a challenge to the sufficiency of the evidence, “[w]e examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.* at 196.

“The elements of second-degree murder are: (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). 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. Acting with obvious disregard for life-endangering consequences can establish malicious intent. *Id.* at

466. Malice may also be inferred from the use of a knife. *People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999); *People v Roper*, 286 Mich App 77, 85; 777 NW2d 483 (2009).

The record contained sufficient evidence from which a rational trier of fact could find that defendant acted with malice. Testimony at trial revealed that defendant and Long had a verbal altercation shortly before Long was cut. Johnson testified that defendant admitted he cut the victim's neck. At trial, the emergency room physician testified that Long's throat was "slashed right down to the trachea which means through, basically the jugular vein, and possibly the artery as well, on the right side." The medical examiner testified that the force used to cause Long's injury was purposeful and intentional, rather than accidental. Evidence that defendant cut Long's throat with force sufficient to cut through his jugular vein and down to his trachea was sufficient to establish that defendant acted with the intent to kill, the intent to cause great bodily harm, or with wanton and wilful disregard of the likelihood that his actions could cause death or great bodily harm. Therefore, the evidence was sufficient to prove beyond a reasonable doubt that defendant acted with malice.

Defendant next argues that the trial court erred in failing to instruct the jury on involuntary manslaughter. However, we conclude that defendant waived any error in the jury instructions by expressly approving them at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002); *People v Meissner*, 294 Mich App 438, 458; 812 NW2d 37 (2011).

Finally, defendant argues that he was denied the effective assistance of counsel because defense counsel failed to request an involuntary manslaughter instruction. We disagree. Because defendant did not move for a new trial or a *Ginther*¹ hearing on this issue, this Court's review is limited to mistakes apparent in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-part test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, a convicted defendant must demonstrate that his attorney's performance was deficient. *Id.* at 600. "This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Id.* (quotation marks and citation omitted). Effective assistance is presumed, and a defendant bears the burden of proving his attorney's decisions were not sound trial strategy. *People v Gaines*, 306 Mich App 289, 300; 856 NW2d 222 (2014). Second, a defendant must show that, absent counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Id.* Failure to request an instruction that is inconsistent with a defense theory is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003).

Defendant's theory of the case was that the prosecutor could not prove that he inflicted the injury because no one saw defendant with a knife and the police did not recover a knife with

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Long's blood on it. This theory was inconsistent with a theory that defendant inflicted Long's injury, but that his actions amounted to involuntary manslaughter rather than murder. Because the failure to request an involuntary manslaughter instruction appears to have been a reasonable strategic decision by defense counsel, defendant has not shown that his attorney's actions constituted ineffective assistance. Further, even if the failure to request an involuntary manslaughter instruction was error, given the weight of the evidence supporting the second-degree murder conviction, defendant has not shown a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600. In sum, defendant's claims lack merit.

Affirmed.

/s/ Pat M. Donofrio
/s/ Michael J. Riordan
/s/ Michael F. Gadola