STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2014
v	No. 313389 Calhoun Circuit Court
ROBERT CURTIS NELSON, Defendant-Appellant.	LC No. 2012-002019-FC

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317, for which he was sentenced as a fourth-offense habitual offender, MCL 769.12, to 70 to 110 years' imprisonment. We affirm defendant's conviction and sentence.

On various occasions, the victim in this case allowed his friends, including defendant, to live at his house in exchange for rent money. On the evening in question, defendant stayed at the victim's home. Sometime during the night, the two had a verbal altercation (allegedly induced by alcohol), which led to defendant beating the victim in the head with a baseball bat multiple times, killing him. The following morning, defendant went to a friend's apartment and disclosed the events from the previous night. The friend called the police, who subsequently arrested defendant. Clothing and a keychain knife seized from defendant contained DNA that was later matched to the deceased victim. Defendant was charged with open murder, MCL 750.318, and convicted of second-degree murder.

On appeal, defendant first argues the trial court erroneously rejected his request to instruct the jury on voluntary manslaughter as a lesser-included offense of murder. We review claims of instructional error involving a question of law de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, we review a trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *Id.*

Voluntary manslaughter is a necessarily lesser-included offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Thus, because defendant was charged with murder, defendant was entitled to a jury instruction for voluntary manslaughter "if supported by a rational view of the evidence." *Id.*

Defendant claims the instruction was warranted because the evidence supported a finding that there was a drunken argument—instigated by the victim's antagonizing—that rapidly escalated into a physical altercation. We disagree. Indeed, the evidence presented at trial established there was an altercation of some sort. However, there was no evidence that it was a physical altercation: the victim's home showed no signs of a disturbance and defendant's body showed no visible signs of injury. On the contrary, defendant's statements to his friend suggest only a verbal altercation occurred; namely, that the victim "got in defendant's face" and antagonized him more than ever before. Words alone are usually insufficient to constitute adequate provocation. *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991). To constitute adequate provocation, the words must be more than "mere insults." *Id.* at 391. The provocation must cause the person to "act out of passion rather than reason." *Id*. at 389. In this case, there was no evidence regarding exactly what the victim said to defendant and therefore nothing to suggest that the victim's words constituted anything more than "mere insults" or were so emotionally arousing as to cause defendant to "act out of passion rather than reason." Without more, a rational view of the evidence did not support an instruction for voluntary manslaughter. Thus, the trial court did not abuse its discretion in denying the request for that instruction.

Defendant next argues that his counsel was ineffective for failing to object to expert testimony interpreting the bloodstain patterns found in the victim's bedroom. We previously declined defendant's request for a remand for an evidentiary hearing pursuant to *Ginther*,[1] *People v Nelson*, unpublished order of the Court of Appeals, entered June 28, 2013 (Docket No. 313389); therefore, our review of defendant's claim is limited to mistakes apparent on the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). To prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1) defense counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To show deficient performance, defendant must show that his counsel's representation fell below an objective standard of reasonableness. *Pickens*, 446 Mich at 311. To show prejudice, defendant must show that his counsel's deficient performance undermined the reliability of the verdict; that is, there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. *Id*. at 314. Counsel is presumed to have provided effective assistance, and defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

In his statement of the questions presented, defendant raises an issue as to whether bloodstain analysis is recognized as scientific evidence. Defendant, however, fails to brief the merits of that claim; therefore, we consider it abandoned. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995). Nevertheless, we have previously recognized the validity of expert testimony concerning bloodstain analysis, and we find no reason to dispute that finding in this case. *People v Haywood*, 209 Mich App 217, 224; 530 NW2d 497 (1995).

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Defendant also argues that the expert's testimony regarding the bloodstain patterns was irrelevant, unhelpful to the prosecution's case, and more prejudicial than probative under MRE 403. We disagree. "[R]elevant" evidence is "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401 (emphasis added). In this case, the expert's testimony, specifically her opinion as to the position of the victim's head when he was first struck, was relevant (and in turn helpful to the prosecution) because it tended to suggest the victim was caught off-guard, thereby negating defendant's theory that the killing occurred during a physical altercation.

However, under MRE 403, relevant evidence may be precluded if its probative value is outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial where there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, the expert's testimony regarding the bloodstain patterns was highly probative to negate defendant's theory that a physical altercation occurred, and as such, it was not unfairly prejudicial. Because the evidence was relevant and not unfairly prejudicial, defense counsel was not ineffective for failing to object to the expert's testimony. See *People v Unger (On Remand)*, 278 Mich App 210, 257; 749 NW2d 272 (2008) (finding that defense counsel is not ineffective for failing to make a futile objection).

Defendant's last argument is that he is entitled to resentencing because the trial court's sentence of 70 to 110 years' imprisonment was excessive. We disagree. A minimum sentence that is within the sentencing guidelines range must be affirmed on appeal "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).

Defendant's recommended minimum range under the sentencing guidelines was calculated to be 315 to 525 months' imprisonment or life imprisonment. MCL 777.61. However, because defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, the upper limit of the recommended minimum sentence range was increased by 100 percent to a total of 1,050 months. MCL 777.21(3)(c). Thus, defendant's minimum sentence of 70 years (840 months) clearly fell within the applicable guidelines range. A sentence within the guidelines range is presumptively proportionate, *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008), and because defendant did not argue there was an error in scoring or that inaccurate information was relied upon, we must affirm his sentence on appeal, MCL 769.34(10).

Affirmed.

/s/ /Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher