

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY J. BURCH,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 241080

Muskegon Circuit Court

LC No. 00-045357-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, for the beating death of Cornelius McCray. He was sentenced to a prison term of 22 ½ to 50 years. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence of malice to support his second-degree murder conviction because the evidence established that defendant killed McCray in the heat of passion in response to temporary excitement resulting from adequate provocation. Reviewing this sufficiency of the evidence issue de novo, *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), we disagree.

To establish second-degree murder, the prosecution must prove beyond a reasonable doubt: (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), citing *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). 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 willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Goecke, supra* at 464, citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

Viewing the evidence in a light favorable to the prosecution, as we are required to do, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), we find that the prosecution presented sufficient evidence from which a rational trier of fact could have found that malice was proven beyond a reasonable doubt. There was testimony that defendant said to McCray, "Wait. I'm gonna kill you," moments before he killed McCray. Testimony also established that the beating defendant inflicted on McCray was a severe one, consisting of over nine blows to McCray's head that resulted in multiple fractures to McCray's

skull, cheekbones, nose, jawbones, and dentures. There was also testimony that defendant admitted to repeatedly hitting McCray even after McCray stopped moving. Because a jury can infer malice from the facts and circumstances of the killing, *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991), and because of the severity of the beating that defendant inflicted on McCray is evidence that defendant at least intended to cause McCray great bodily harm, if not death, we conclude that a rational jury could have found that the prosecution proved malice beyond a reasonable doubt.

The circumstances of a killing may mitigate murder to voluntary manslaughter if those circumstances demonstrate that (1) malice was negated by adequate and reasonable provocation, (2) the killing was done in the heat of passion, and (3) there was not a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

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.” *Pouncey, supra* at 389, citing *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974). Further, provocation is adequate when it would cause a reasonable person to lose control. *Id.*, citing *Townes, supra* at 590. Here, the evidence established that, during a struggle with defendant, McCray grabbed a knife and inflicted a five-inch-long wound on defendant’s face that cut right down to the bone in certain areas. Given the severity of the wound inflicted on defendant, the injury was such as to cause defendant to act out of passion rather than reason. Moreover, the cut would have caused a reasonable person to lose control. We therefore conclude that defendant’s malice was negated by adequate and reasonable provocation.

Nevertheless, because a sufficient lapse of time occurred for defendant’s blood to have cooled, the circumstances of the killing are not of the type that would mitigate a murder to manslaughter. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995); *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993). Further, the defendant must “have acted on impulse, without thinking twice, from passion instead of judgment.” CJI2d 16.9(2).

In the present case, there was testimony that, after McCray cut defendant, McCray immediately went outside, while defendant remained in the house. Defendant admitted in a police interview that, after receiving the injury to his face, he proceeded to the bathroom to view his face in the mirror. Further testimony indicated that defendant then went to another room and emerged carrying a two-by-four. There was also testimony that McCray had time to get on his bike and ride for a short time before defendant chased him down. In addition, there was testimony that, before beating McCray to death, defendant walked away from McCray and went to a neighbor’s yard to find another weapon.

This was not a killing where the defendant possessed a weapon at the time of the alleged provocation and “acted on impulse, without thinking twice.” CJI2d 16.9(2). Rather, defendant had time between when he received the injury and when he killed McCray to look at his face in a mirror, find a two-by-four, catch up with McCray’s bike, and walk away from McCray to search for another weapon in a neighbor’s yard.

Moreover, although defendant argues that McCray further assaulted defendant once the two were outside, there is no eyewitness testimony in the record that McCray cut defendant

anywhere but on his face. Trial testimony established that McCray never hit or cut defendant once outside and that defendant was the aggressor. Further, although there was testimony that defendant was treated at the hospital for a cut in his abdomen as well as for the one in his face, the testimony was established that defendant was not even aware of the cut to his abdomen until after he reached the hospital. Thus, even if McCray did inflict this injury just before the killing, defendant's ignorance of that injury at the time of the killing indicates that the injury did not excite his passions and provoke the killing. In conclusion, because the circumstances surrounding the beating were not sufficient to mitigate the degree of the offense from second-degree murder to manslaughter, and because there was sufficient evidence from which a rational trier of fact could have found that the prosecution established malice beyond a reasonable doubt, we find no merit to defendant's argument.

Defendant also argues that he was deprived of his state and federal constitutional right to effective assistance of counsel because of trial counsel's failure to request a hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965), his failure to urge defendant to testify in support of the theory of self-defense, and his failure to present or request a jury instruction on "imperfect self-defense." We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001). Where, as here, a defendant fails to move for a new trial or an evidentiary hearing regarding his ineffective assistance claim, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Trial counsel's failure to request a *Walker* hearing did not amount to objectively unreasonable assistance because defendant's statements were admissible. 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, 1612; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The prosecution has the burden of establishing by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). The record evidence reveals that the prosecutor would have sustained this burden had trial counsel requested and received a *Walker* hearing regarding the admissibility of defendant's statements to the police.

There was ample evidence in the record to establish that defendant knowingly and intelligently waived his *Miranda* rights because all three of the officers who interviewed defendant testified that they either read defendant his rights and asked him if he understood and waived these rights, or they made sure that defendant had been previously read his rights and was still willing to talk.

Furthermore, defendant's statements were voluntary. In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there

was unnecessary delay of arraignment; whether he was injured, intoxicated, or drugged, or in ill health when he gave the statement; whether he was deprived of food, sleep, or medical attention; whether he was threatened or abused; and any promises of leniency. *People v Sexton*, 458 Mich 43, 66; 580 NW2d 404 (1998). Implicit in *Sexton*, and further expressed in *People v Bender*, 452 Mich 594, 604; 551 NW2d 71 (1996), is the rule that, in order for a defendant's statement to be deemed involuntary, the statement must be the product of police coercion.

In the present case, there was testimony that defendant told the police he had not slept the night before; however, defendant told the police that the reason he had not slept was that he was out "having fun" with a woman. Thus, it was defendant's actions, and not those of the police, that deprived defendant of sleep. Further, although defendant contends that he had not eaten, there is no testimony in the record regarding whether defendant had anything to eat the day of the murder. Moreover, although defendant did sustain injuries to his face and abdomen, the police did not cause those injuries. The police transported defendant to the hospital for prompt treatment of those injuries shortly after defendant's arrest.

Defendant further asserts that he had been drinking and was "in shock" when he made his statements to the police. However, the fact that a person is under the influence of drugs is not dispositive of the issue of voluntariness. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). Here, a police officer who interviewed defendant at the hospital testified that defendant was oriented as to time, place, and person, was aware of his surroundings, and did not have slurred speech when he made his statement. Thus, given the totality of the circumstances, we conclude defendant's statements were voluntary.

Because defendant's statements were admissible, defense counsel was not ineffective for failing to challenge the admission of these statements. Defense counsel is not required to make motions that have no merit. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Accordingly, defense counsel's failure to request a *Walker* hearing did not deprive defendant of his right to effective assistance of counsel.

Defendant further argues that defense counsel deprived him of effective assistance for failing to urge defendant to testify in support of the self-defense theory that defense counsel was advocating. Because defendant did not request an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Here, the record does not indicate whether defense counsel urged defendant to testify. The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Because there is no basis for us to review defendant's assertion, we decline to decide the issue.

Defendant further contends that defense counsel's failure to present and request a jury instruction on the defense of "imperfect self-defense" deprived him of effective assistance. As a rule, trial counsel's decisions regarding whether to present a defense are presumed to be matters of trial strategy. *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999). In the case at bar, defendant has not established that trial counsel's failure to present this defense was anything other than sound trial strategy because the facts of this case do not support a theory of imperfect self-defense.

Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993), citing *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). This defense only applies where a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor. *Kemp, supra*, citing *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990).

Here, even if defendant had not been the initial aggressor, defendant's use of deadly force was not immediately necessary. Eyewitness testimony established that, at the time the defendant beat McCray to death, McCray was attempting to flee from defendant on his bike. Further, there was uncontested eyewitness testimony that McCray never hit defendant with the two-by-four or any other weapon during the beating, and there was no indication that the level of force defendant used was justified. There was testimony that McCray received at least nine blows and had fractures all over his face from multiple fractures in his skull to fractures in his nose, cheekbones, jawbone, and dentures. Thus, even if defendant had not been the initial aggressor, eyewitness testimony established that defendant's use of deadly force was not immediately necessary.

Because defendant has failed to establish that trial counsel's failure to present or request a jury instruction on imperfect self-defense was anything more than sound trial strategy, and because trial counsel is not required to advocate a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), there is no merit to defendant's argument that trial counsel's failure to present this defense or to request a jury instruction on it deprived defendant of his state and federal right to effective assistance of counsel.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray