

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GJON PEPAJ,

Defendant-Appellant.

UNPUBLISHED

August 23, 2005

No. 255370

Oakland Circuit Court

LC No. 2003-191465-FC

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316(1)(a), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of life without parole for the murder conviction and two to five years for the CCW conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. He appeals by right. We affirm.

Defendant was convicted of fatally shooting Gjek Isufaj during a mass at St. Paul's Albanian Church in Rochester Hills. Defendant and the decedent, formerly friends, were allegedly involved in an Albanian blood feud, or "gjakmartja."

I. Admissibility of Defendant's Custodial Statement

Defendant first argues that the trial court erred in denying his motion to suppress his custodial statement to the police. Defendant, whose native language is Albanian, argues that his statement was not voluntarily or intelligently given. The trial court denied defendant's motion to suppress following a *Walker*¹ hearing.

An effective waiver of *Miranda*² rights must be both voluntary given, and knowingly and intelligently made. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). In determining

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

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

whether *Miranda* rights were validly waived, the trial court must review the totality of the objective circumstances surrounding the waiver. *Id.* at 634. This Court reviews for clear error the trial court's factual findings regarding a defendant's waiver of *Miranda* rights. *Id.* at 629.

“[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion.” *Id.* at 635. The test of voluntariness is “whether, considering the totality of all the surrounding circumstances, the confession is ‘the product of an essentially free and unconstrained choice by its maker,’ or whether the accused’s ‘will has been overborne and his capacity for self-determination critically impaired’ The line of demarcation ‘is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.’” *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 1037 (1961). Here, there is nothing in the circumstances surrounding defendant's statement to suggest that defendant's will was overborne or that he was compelled to make the statement. The trial court did not clearly err in finding that defendant's statement was voluntarily given.

Defendant's principal argument is that his statement was not knowingly and intelligently made. “In contrast to the voluntary prong, determining whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior.” *Daoud, supra* at 636. To knowingly waive *Miranda* rights, a suspect “need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him.” *Id.* (citations omitted). “[T]o establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.” *Id.* at 637 (citations omitted).

We have reviewed the videotaped interview of defendant's interrogation and are satisfied that the trial court did not clearly err in finding that defendant knowingly and intelligently waived his *Miranda* rights. Although defendant had some difficulty with the English language, he asked questions when he did not understand something, and the detective who interviewed defendant repeated and rephrased anything defendant seemed unclear about, interjected several times with questions about defendant's ability to understand, and reminded defendant to tell him if anything were unclear. Defendant repeatedly indicated, that he understood what was being said and answered questions appropriately and in great detail. Additionally, although defendant requested an interpreter at the *Walker* hearing, as the trial court noted, defendant repeatedly answered questions in court before they were interpreted, thereby reflecting his ability to comprehend the English language. The record reflects that, at a minimum, defendant possessed the requisite basic understanding of his rights, which is all that is required for a knowing and intelligent waiver. *Id.* at 642.

Defendant also argues that the police improperly questioned him before he waived his rights. We disagree. The record reflects that the police asked defendant a number of background questions regarding his age, work history, time in this country, and medical condition before advising him of his *Miranda* rights. The police are required to give *Miranda* rights before a custodial interrogation. Interrogation “refers to express questioning and to any words or action on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). In this case, the background questions did not involve interrogation because

they were not likely to elicit an incriminating response. Instead, the questions were designed to determine whether defendant was able to understand his rights and respond in English. Indeed, the interviewing officers stopped defendant from giving information about the crime until after he had been advised of his rights. Therefore, we find no merit to this argument.

Nor is there merit to defendant's claim that the questioning should have stopped because he said he did not want to talk to the interviewing officers. Although the record reflects that defendant indicated that he wanted to talk to an officer he knew from another jurisdiction, he also indicated that he wanted to talk to the officers who were interrogating him.

Defendant also asserts that the police misled him about the definition of coercion. While reading defendant his rights from an advice of rights form, the officer read the line, "No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." The officer explained what coercion meant by explaining, "Say I wanted to talk to you . . . so I open up that door and your wife's there and my partner's out there and he's holding a gun to her head saying, you're gonna talk to us, you're gonna talk to us. That's kind of forcing you to do something you don't want to do." Defendant asserts that the example given actually refers to duress, not coercion. We are satisfied that the officer's example and subsequent statement that coercion is "kind of forcing you to do something you don't want to do" was not calculated to mislead defendant about the meaning of coercion.

Last, defendant asserts that when the detective wanted to know why he shot the decedent and told him, "The why becomes important to you," the officer made some sort of promise. We disagree. The officer did not promise defendant anything, but merely informed him that the reason he shot the decedent was an important matter.

The trial court did not err in denying defendant's motion to suppress his statement.

II. Instructional Issues

Defendant argues that he is entitled to a new trial because of instructional errors. We disagree.

This Court reviews claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole, not extracted piecemeal to establish error. *Id.* Even if somewhat imperfect, instructions do not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.* No error results from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction. *Id.*

Here, however, most of defendant's claims of instructional error were not preserved with either an objection or request for instruction below. These unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

A. Unpreserved Issues

Defendant argues that the trial court's jury instruction on self-defense was improper because, while it informed the jury that self-defense is available where a defendant honestly and reasonably believes that he is in danger of being killed, it did not provide that it is also available where the defendant believes that he was only in danger of serious bodily injury. The standard jury instruction on self-defense, CJI2d 7.15, provides alternate bases for when a defendant is entitled to use deadly force: when he is afraid of death, forcible sexual penetration, or serious bodily injury. In this case, defendant's theory was that the decedent intended to kill him. Because the trial court correctly instructed the jury on the basis for defendant's claim of self-defense, defendant has not shown a plain error affecting his substantial rights.

Defendant argues that the trial court's instruction on second-degree murder erroneously failed to inform the jury that in order to find him guilty of second-degree murder, it must find that "the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime." CJI2d 16.5. It was defendant's theory that the killing was excused because he acted in self-defense. The trial court instructed the jury that if defendant acted in self-defense, "his actions are excused and he is not guilty of any crime." Viewed as a whole, the instructions sufficiently protected defendant's rights.

Defendant argues that the trial court erred by failing to instruct the jury on his state of mind in accordance with CJI2d 16.23. To the extent defendant argues that the trial court erred by failing to fashion an instruction consistent with CJI2d 16.23(3), based on his alleged diminished capacity, defendant has not shown a plain error because the Supreme Court abolished the so-called diminished capacity defense in *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001). The trial court's instructions otherwise informed the jury concerning the necessary state of mind for both first- and second-degree murder. Thus, defendant's substantial rights were not affected.

Contrary to what defendant asserts, the trial court instructed the jury on motive in accordance with CJI2d 4.9. Furthermore, the trial court did not err when instructing the jury that

the prosecutor need not prove a motive for the killing. But, you may consider motive in deciding if there was premeditation and deliberation. Motive, by itself, does not prove premeditation and deliberation.

This instruction is taken from CJI2d 16.21(6) and accurately reflects the law. See *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).

Because an instruction on second-degree murder was supported by a rational view of the evidence, the trial court did not plainly err by instructing the jury on that offense. *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). In any event, because the jury convicted defendant of the higher charge of first-degree murder, any error was harmless. *Id.* at 362-364.

The trial court did not plainly err by failing to instruct the jury on the lesser offenses of involuntary manslaughter, discharge of a firearm pointed intentionally but without malice, MCL 750.329, and careless, reckless, or negligent discharge of a firearm, MCL 752.861. These offenses were not supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 542; 664 NW2d 685 (2003); *Cornell, supra* at 357. In any event, because the jury

convicted defendant of the highest charge, first-degree murder, any error in this regard again would have been harmless. *Id.* at 362-364.

B. Preserved Issues

Defendant argues that the trial court erred by denying his request for an instruction on voluntary manslaughter. We disagree.

Although there was a history of “bad blood” between defendant and the decedent, the shooting occurred during a crowded mass in a church. The trial court found that the only threat on that particular day was that the decedent made a face with “tightened teeth” as he passed defendant’s church pew. A rational view of the evidence failed to show that the killing occurred in the heat of passion, caused by adequate provocation, without a lapse of time during which a reasonable person could control his passions. *Mendoza, supra* at 535. So, the trial court did not err by denying defendant’s request for an instruction on voluntary manslaughter. *Id.* at 542.

The trial court also properly denied defendant’s request for an instruction on imperfect self-defense. Imperfect self-defense is a qualified defense that can mitigate second-degree murder to manslaughter. It applies “where the defendant would have been entitled to self-defense had he not been the initial aggressor. One who uses more force than is necessary is not entitled to assert self-defense.” *People v Kemp*, 202 Mich App 318, 325 n 2; 505 NW2d 184 (1993). Here, the evidence showed that after the decedent gave defendant a “look” and sat down in church, defendant shot the decedent seven times in the back and twice in the head, then struck him in the head with the empty gun. The trial court properly found that defendant could not claim imperfect self-defense because he used excessive force. In any event, because defendant was convicted of the higher charge of first-degree murder, any error was harmless. *Cornell, supra*.

III. Admissibility of Expert Testimony

Defendant argues that the trial court erred by excluding the expert opinion testimony of Dr. Michele Hill, who conducted a competency examination of defendant before trial. We disagree. A trial court’s decision whether to admit or exclude evidence is reviewed for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986).

With regard to his claim of self-defense, defendant sought to admit Dr. Hill’s opinion that defendant’s “stated fear of dying at the hands of his current victim was sincere and not exaggerated. It is this examiner’s belief that [defendant] did indeed fear that his life was in imminent danger at the time of the alleged offense and that he had no other resource at his disposal other than the action he took.”

MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if

(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court did not fully explain its rationale for excluding Dr. Hill's proposed testimony, but it apparently was not convinced that Dr. Hill's opinion about defendant's truthfulness reflected specialized knowledge that would have assisted the jury.

We agree that Dr. Hill's conclusion on the ultimate issue whether defendant acted in self-defense was not a proper subject for expert testimony. See *Phillips v Wainwright*, 624 F2d 585 (CA 5, 1980). Moreover, Dr. Hill's opinion was based largely on defendant's statements during the competency examination, and MCL 768.20a(5) prohibits admission at trial of a defendant's statements during a competency examination except on the issues of mental illness or insanity at the time of the offense, which were not at issue here. The trial court did not abuse its discretion by excluding Dr. Hill's testimony.

We affirm.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey