

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ROBERT RAWLS, JR.,

Defendant-Appellant.

UNPUBLISHED

March 20, 2007

No. 264892

Washtenaw Circuit Court

LC No. 04-001572-FC

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316(a); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

This case involves the shooting death of defendant's mother, with whom he had been living since his release from prison two weeks before the murder. The morning of the murder, defendant's grandmother (the victim's mother), died in a hospice center. The victim left home to make funeral arrangements and returned home in the mid-afternoon. In the late afternoon, in response to a 911 call, police were dispatched to the house, where they found defendant and the victim, who died from seven gunshot wounds inflicted with a 12-gauge shotgun.

Defendant first argues that the trial court erred in denying his motion to suppress the physical evidence seized by the police, as well as his statements to the police, on the basis that they were the products of an illegal search and arrest. We review de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, we will not disturb a trial court's factual findings at a *Walker*¹ hearing unless they are clearly erroneous. *Id.* A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court made a mistake. *Id.* at 564.

The Fourth Amendment prohibits unreasonable searches and seizures. US Const, Am IV; 1963 Const, art 1, § 11. Generally, searches conducted without a warrant are per se unreasonable under the Fourth Amendment unless the police conduct falls under an established exception to

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

the warrant requirement. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). The emergency aid exception was described by the United States Supreme Court in *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978), and recognized by our Supreme Court in *City of Troy v Ohlinger*, 438 Mich 477; 475 NW2d 54 (1991). In *People v Davis*, 442 Mich 1, 25-26; 497 NW2d 910 (1993), our Supreme Court ruled:

[P]olice may enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion. In addition, the entry must be limited to the justification thereof, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance.

The information available to the police in this case, a 911 call from a screaming woman; a hang up and no answer when the dispatcher called back; two “muffled bangs” and a “boom” coming from inside the house; a window shade being pulled down after the police arrived on the scene; the family pastor’s indication that defendant had recently been released from prison after serving time for a violent crime; and defendant’s suspicious behavior, constituted specific and articulable facts leading to the reasonable belief that someone inside the house was in need of immediate aid. The trial court properly determined that the police entry into the house was justified on the basis of the emergency aid exception to the search warrant requirement, and properly denied defendant’s motion to suppress the evidence on that basis.

Defendant also argues that he was unlawfully detained and arrested, and that therefore the statements he made in the police car and at the police station should have been suppressed as “fruits of the poisonous tree.” We disagree. First, defendant was not unlawfully detained or arrested. Based on defendant’s suspicious behavior, the fact that no one else was in the house when they arrived shortly after the 911 call, and the muffled noises coming from the house, the police had probable cause to detain and arrest defendant after they found his mother dead in the house. However, even if defendant was unlawfully detained, suppression of the statements made by the defendant is not mandated unless a causal nexus exists between the illegal arrest and the statements. *People v Feldmann*, 181 Mich App 523, 529; 449 NW2d 692 (1989). Whether the connection between a defendant’s detention and statements is sufficiently attenuated to purge the taint is determined by considering the temporal proximity between the arrest and the statements; the flagrancy of official misconduct; any intervening circumstances occurring after the arrest; and any circumstances preceding the arrest. *Id.* “Intervening circumstances can break the causal chain between the unlawful arrest and inculpatory statements, rendering the [statements] sufficiently an act of free will to purge the primary taint of the unlawful arrest.” *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1988) (internal quotations omitted). See also *Wong Sun v United States*, 371 US 471, 486; 83 S Ct 407; 9 L Ed 2d 441 (1963). Specifically, the primary taint of an unlawful arrest can be sufficiently attenuated by the discovery of evidence establishing probable cause to arrest so as to render the defendant’s statements properly admissible. *Kelly*, *supra* at 634-635.

The record establishes that even if defendant had been unlawfully detained, the connection between defendant’s initial detention and his statements was sufficiently attenuated to purge any taint of an unlawful arrest. Specifically, the statements defendant made in the police car occurred after the police had already discovered evidence establishing probable cause

to arrest him. In any event, defendant's statements were volunteered and not made in response to interrogation. Defendant's statements at the police station were made several hours after his initial detention and after executing a valid waiver of *Miranda*² rights. Moreover, the police did not engage in official misconduct. On the record before us, defendant's statements were sufficiently an act of free will to purge any taint of an alleged unlawful arrest. *Kelly, supra* at 634. The trial court properly denied defendant's motion to suppress his statements.

Defendant next argues that the trial court abused its discretion in denying his motion for an in camera review of police personnel files to determine whether they contained information regarding prior misconduct that could be used for impeachment purposes to cast doubt on the credibility of the testifying officers. We review for an abuse of discretion a trial court's decision regarding discovery. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). We also review for an abuse of discretion a trial court's decision whether to conduct an in camera review of a discovery request. *People v Laws*, 218 Mich App 447, 454-455; 554 NW2d 586 (1996). An abuse of discretion is found if the trial court's decision falls outside of the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). *Id.* at 455. We review de novo the interpretation of court rules as a question of law. *Phillips, supra* at 587.

"There is no general constitutional right to discovery in a criminal case," *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), and "discovery in criminal cases is constrained by the limitations expressly set forth in the . . . criminal discovery rule promulgated by our Supreme Court, MCR 6.201." *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447; 722 NW2d 254 (2006); *Phillips, supra* at 587-589. "In clarifying what is subject to discovery under the Michigan criminal discovery rule, our Supreme Court held that either the subject of the discovery must be set forth in the rule or the party seeking discovery must show good cause why the trial court should order the requested discovery. Absent such a showing, courts are without authority to order discovery in criminal cases." *Greenfield, supra* at 448. "Due process requires only that the prosecution provide a defendant with material, exculpatory evidence in its possession," *id.*, citing *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994); *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), which is contemplated in MCR 6.201(B)(1). "That obligation extends to impeachment evidence," *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985), and "*Brady* recognizes no distinction between evidence which serves to impeach a government witness' credibility and evidence which is directly exculpatory of the defendant." *United States v Mullins*, 22 F3d 1365, 1372 (CA 6, 1994). "The [United States] Supreme Court has made clear that the *Brady* rule is not an evidentiary rule which grants broad discovery powers to a defendant." *United States v Todd*, 920 F2d 399 (CA 6, 1990), citing *Weatherford v Bursey*, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977). Indeed, "[m]ere speculation that a government file may contain *Brady* material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court." *United States v Driscoll*, 970 F2d 1472, 1482 (CA 6, 1992) (internal citations and quotations omitted), abrogated on other grounds

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

by *Hampton v United States*, 191 F3d 695 (CA 6, 1999). Moreover, our Supreme Court has ruled that “when a discovery request is made[,] disclosure should not occur when the record reflects that the party seeking disclosure is on ‘a fishing expedition to see what may turn up.’” *Stanaway, supra* at 680, quoting *Bowman Dairy Co v United States*, 341 US 214, 221; 71 S Ct 675; 95 L Ed 879 (1951). “The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial . . . rests upon the moving party.” *Stanaway, supra* at 680, quoting *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960).³

Because defendant’s request here was based on nothing more than rumors from “a couple of different people at the jail,” the prosecution was not required to provide defendant with the personnel files of the officers at issue here, and the trial court was not required to conduct an in camera review of those files. Under the plain language of MCR 6.201, the police personnel files were not subject to mandatory disclosure under subrule (A), were not *Brady* material subject to discovery under subrule (B), did not constitute “information or evidence that is protected from disclosure by constitution, statute, or privilege” under subrule (C), and were not material subject to discovery “[o]n good cause shown” under MCR 6.201(I). Thus, the trial court did not err in its determination that defendant failed to make a preliminary showing that subject to discovery under MCR 6.201(B)(1).

Defendant next argues that the trial court abused its discretion in denying his motion to exclude a photograph depicting the shotgun wound on the victim’s hand. We review for an abuse of discretion a trial court’s decision whether to admit or exclude evidence. *People v Gonzalez*, 256 Mich App 212, 217; 663 NW2d 499 (2003). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id.* We review de novo decisions regarding the admission of evidence that involve a preliminary question of law, such as the interpretation of a rule of evidence. *Id.*

³ Defendant relies on *United States v Henthorn*, 931 F2d 29 (CA 9, 1991), to support his argument. In *Henthorn*, the Court of Appeals for the Ninth Circuit held that “the government must ‘disclose information favorable to the defense that meets the appropriate standard of materiality,’” and that “[i]f the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in camera inspection and evaluation. . . .” *Id.* at 30-31, quoting *United States v Cadet*, 727 F2d 1453 (CA 9, 1984). The Ninth Circuit further concluded that it was not the defendant’s burden to make an initial showing of materiality, and that the obligation to examine the files arises merely by virtue of the defendant’s demand for the production of the personnel files. *Henthorn, supra* at 31. The *Henthorn* Court remanded the case for the district court to conduct an in camera review of the personnel files and to determine whether the information should have been disclosed, and, if so, whether the nondisclosure was harmless beyond a reasonable doubt. *Id.* However, the approach taken in *Henthorn* was implicitly rejected by the Court of Appeals for the Sixth Circuit in *Driscoll, supra* at 1482, which concluded that “under *Brady*, the Government was not obligated to produce personnel files of its testifying agents, based solely upon the defendant’s speculation that those files might contain impeaching information.” See *United States v Floyd*, 247 F Supp 2d 889, 901 (SD Ohio, 2002). See also *Stanaway, supra* at 680.

Defendant does not dispute the relevance of the photograph, but argues that the trial court abused its discretion in denying his motion to exclude it where its probative value was substantially outweighed by the danger of unfair prejudice under MRE 403.

Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of . . . a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking . . . crime, even though they may tend to arouse the passion or prejudice of the jurors. [*People v Mills*, 450 Mich 61, 77; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995), quoting *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972).]

“[U]nfair prejudice occurs where either ‘a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect,’ or ‘it would be inequitable to allow the proponent of the evidence to use it.’” *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002), citing *Mills*, *supra*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Photographs should be excluded if they may lead the jury to abdicate its truth-finding function and convict on passion. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991).

In this case, the record does not reveal that the jury would have or did give disproportionate weight to the photograph or decided the case based on passion incited by the photograph. As in *Mills*, *supra* at 77-78, the photograph did not present an enhanced or altered representation of the injury, but rather, was an accurate representation of the injury defendant inflicted on the victim. Indeed, “jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing . . . the body of a victim in the condition . . . in which [it was] found.” *Id.* at 77, quoting *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969) (citations omitted). Although graphic, the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion in denying defendant’s motion to preclude its admission.

Defendant next argues that his Fourth Amendment rights were violated where the search warrant was based on false information. Defendant did not raise this issue below; therefore, it is unpreserved for review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We review unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Defendant argues that police statements used to obtain the search warrant were inconsistent with statements in the police report. Specifically, defendant takes issue with the validity of the officers’ statements that they told him they were at the house to check for problems; that they requested permission to enter the house; that he refused to allow them to enter the house; and that he indicated there was no problem at the house.

A search or seizure is considered unreasonable when it is conducted pursuant to an invalid warrant. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). “[I]f false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause.” *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992), citing *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978). “In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause.” *Stumpf, supra* at 224. Where the defendant makes the required showing, the evidence obtained as a result of the search warrant must be excluded as the fruits of an illegal search. *People v Reid*, 420 Mich 326, 336; 362 NW2d 655 (1984).

Here, even had defendant moved to suppress the evidence obtained pursuant to the search warrant on the basis that it was procured with false information, he would not have been able to show by a preponderance of the evidence that the police, knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit, and that the false material was necessary to a finding of probable cause. Defendant cites generally to the police report to support his assertion, but that report is not contained anywhere in the lower court record and may not be considered. MCR 7.212(C)(7). The only other support for defendant’s argument is his own self-serving affidavit, averring to an almost verbatim recitation of the argument offered in the issue section of his brief. A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Further, the record reveals that, contrary to defendant’s assertion, the challenged statements were consistent with the officers’ trial testimony. Nothing in the record supports that the statements were false. Defendant’s mere assertion that certain information was false and/or inconsistent with information contained in the police report is not sufficient to demonstrate that the affiant included the allegedly false material in the affidavit.

Moreover, the 911 call by a screaming woman, the fact that the telephone line was disconnected and not answered when the dispatcher called back, the noises coming from inside the house, the window shade being closed, and the family pastor’s indication that defendant had recently been released from prison after serving time for a violent crime, and defendant’s suspicious behavior all supported a finding of probable cause to obtain a search warrant. Thus, defendant would not have been able to prevail in a motion to suppress, *Stumpf, supra*, and he has failed to demonstrate plain error affecting his substantial rights. Accordingly, he has forfeited this issue. *Carines, supra* at 763-764.

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to investigate the circumstances surrounding the allegedly illegal search warrant, failed to move to suppress the evidence seized by the police as a result of the allegedly illegally obtained search warrant, and failed to impeach prosecution witnesses with prior inconsistent

statements. Defendant failed to move for a new trial or *Ginther*⁴ hearing in the trial court; therefore, this issue is unpreserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* at 659.

To prove ineffective assistance of counsel, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that, but for that deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). Because defendant bears the burden of demonstrating both deficient performance and prejudice, he necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, as noted above, defendant's claim that the search warrant was illegally obtained is without merit. Defense counsel is not ineffective for failing to make a meritless motion, *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998), or for failing to raise futile objections. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). On appeal, defendant has not only failed to establish necessary facts to show that a motion to suppress would have had merit, but he has not demonstrated that his counsel could have effectively impeached any officers with their alleged prior inconsistent statements. Because the appellate record does not support defendant's assertion of ineffective assistance of counsel, reversal is not warranted.

Finally, defendant argues that the trial court abused its discretion in denying defense counsel's motion to withdraw. We review for an abuse of discretion a trial court's decision regarding a motion to withdraw. *In re Withdrawal of Attorney (Cain v Dep't of Corrections)*, 234 Mich App 421, 431; 594 NW2d 514 (1999). An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Id.* Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel regarding a fundamental trial tactic. *Id.* When a defendant asserts that his assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusions on the record. *Id.*

Defendant failed to demonstrate good cause why the trial court should grant defense counsel's motion to withdraw. A review of the record reveals that defendant requested defense counsel file a motion to withdraw as counsel, alleging that a breakdown in the attorney/client relationship had occurred. At the hearing on the motion, defense counsel explained that defendant was not listening to her advice and had informed her that he was instead listening to the advice from his "lawyer," another inmate at the jail. Defense counsel averred that defendant

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

was acting against her advice and in a manner that was not in his best interest. Defense counsel indicated, however, that she was prepared to go to trial on the scheduled date, which was less than two weeks away. Defendant argued that the trial court should grant defense counsel's motion to withdraw on the basis that defense counsel declined to use an alibi defense and failed to investigate and challenge the validity of the search warrant. The trial court indicated that the evidentiary issues had already been decided, and denied the motion on the basis that defendant was being adequately represented.

As noted above, defendant's contention that the search warrant was obtained on the basis of false statements was without merit, and defense counsel was not ineffective for failing to pursue the unfounded claim. Further, defendant's difference of opinion regarding his defense was not legitimate, where defense counsel made the strategic decision to refrain from pursuing an alibi defense, and to instead pursue a more plausible defense of creating reasonable doubt in the minds of the jurors. "Appointed counsel filed every appropriate pretrial motion, demonstrating dedication and commitment to defendant's case. Further, a review of the record reveals that appointed counsel was prepared and competent to represent defendant." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Accordingly, the trial court did not abuse its discretion in denying defense counsel's motion to withdraw.

We affirm.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Kurtis T. Wilder