S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SHAWN LYNN SALYERS,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 248540
Jackson Circuit Court
LC No. 02-006612-FC

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of voluntary manslaughter, MCL 750.321, for which he was sentenced, as a second habitual offender, MCL 769.10, to 88 to 270 months' imprisonment. We affirm.

Defendant and his girlfriend, Kimberly Amyot, got into an argument in their trailer home. Amyot's two young daughters were watching TV in defendant's bedroom. Amyot was intoxicated and had high levels of a sedative in her bloodstream. During the argument, the two girls heard their mother scream for help. The argument became physical, and defendant grabbed a vodka bottle, smashing it over Amyot's head. Amyot warded off several blows, but defendant swung the broken bottle at Amyot, severing her jugular vein. During the physical altercation, both defendant and Amyot were seated next to each other on the couch. Defendant did not call an ambulance; instead, he covered the dying victim with a blanket. He warned the girls to stay in the bedroom, then left. Defendant went to the home of a cousin where he smoked crack cocaine.

After defendant left the trailer, the girls came out into the living room and found their deceased mother. Hysterical and crying, the children ran to a neighbor's trailer. The neighbor called 911 and took the children to another neighbor, who watched them until the police arrived. After defendant was arrested, he admitted killing Amyot with the broken vodka bottle, though he denied killing her intentionally.

Defendant's first trial ended in a mistrial after a police officer disclosed a statement made by one of the victim's children. The parties had agreed that the officer would not mention the statement during his testimony. A copy of the officer's police report was marked to indicate those matters upon which he was permitted to testify and those that were forbidden; however, the actual report utilized by the officer was not marked, and he rendered testimony on a subject that was to be excluded. Defendant subsequently moved for a mistrial, and the motion was granted.

Defendant argues that his retrial was barred by double jeopardy and that counsel was ineffective by failing to object to the retrial. Double jeopardy protection attaches when a jury is selected and sworn and is thus applicable before the conclusion of a trial. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). Where a trial ends before a verdict is rendered, such as where a mistrial is declared, the Double Jeopardy Clause may bar a retrial. *Id.* A charged offense may be retried without offending the Double Jeopardy Clause where the mistrial was declared because of a hung jury, or where the prosecutor or judge made an innocent error or the cause prompting the mistrial was outside of their control. *Id.* at 252. "Where the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim." *Id.* at 253. If the defendant's motion for mistrial is prompted by intentional prosecutorial conduct, however, the defendant has not, by moving for a mistrial, waived double jeopardy protection. *Id.*

Here, defendant waived a double jeopardy claim because defense counsel moved for the mistrial and acknowledged on the record that neither the prosecutor nor the police sergeant intentionally engaged in misconduct and, therefore, by doing so, intentionally relinquished a known right. *Id.* at 252-253; see also *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Yet, even if defendant had not waived the double jeopardy issue, it is without merit because the prosecution did not intend to provoke a mistrial or to create unfair prejudice. *Dawson, supra* at 251-252, 256-257. The record shows that the prosecutor did not know that the officer would testify in breach of the stipulation, and he certainly did not act with indifference as to whether the conduct would create unfair prejudice. There was no intentional prosecutorial misconduct. On such a record, the trial court did not commit error in finding no intentional misconduct by the prosecutor. Retrial was appropriate.

Defendant's related claims of ineffective assistance of counsel fail because counsel was not required to pursue a futile position. *People v Riley (After Remand),* 468 Mich 135, 142; 659 NW2d 611 (2003).[1]

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[1] In *People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at

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Next, defendant argues that the evidence was insufficient to support sending the charges of first- and second-degree murder to the jury. We first find that, even if the evidence was not sufficient regarding these two charges, defendant has no grievance as he was not convicted of either charge. We reject defendant's argument that the prejudicial result of these charges going to the jury was that the jury may have compromised by convicting him of voluntary manslaughter. Any error arising from submission of a higher charge to the jury is harmless if the jury acquits the defendant of that charge. *People v Moorer*, 246 Mich App 680, 682-683; 635 NW2d 47 (2001).

Moreover, there was sufficient evidence to support both murder charges. Challenges to the sufficiency of the evidence are reviewed de novo on appeal. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). When determining whether sufficient evidence was presented at trial to support a conviction, an appellate court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hill*, 257 Mich App 126, 140-141; 667 NW2d 78 (2003). This Court "will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses." *Id.* at 141. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997).

To establish the commission of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was deliberate and premeditated. MCL 750.316(1)(a); *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998)(citation omitted). In this regard, under the appropriate circumstances, "[a] pause between the initial homicidal intent and the ultimate act may . . . be sufficient for premeditation and deliberation." *Id.* at 301. Merely forming the intent to kill is insufficient to establish premeditation; rather, in the case of a fight followed by a killing, there must be evidence of a thought process undisturbed by hot blood. *Id.* Thus, the question is not just "whether the defendant had the time to premeditate, but also whether he had the *capacity* to do so." *Id.* (emphasis in original).

The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident. *Haywood*, *supra* at 229. This includes the parties' prior

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690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999).

relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself. *Id.* The circumstances of the killing include the weapon used by the defendant and the location of the wounds inflicted. *People v Moorer*, 262 Mich App 64, 77; 683 NW2d 736 (2004).

The elements of second-degree murder are (1) death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). 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. *People v Goecke,* 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from all the facts and circumstances of the killing. *People v Kemp,* 202 Mich App 318, 322; 508 NW2d 184 (1993).

In the present case, the facts and circumstances support an inference of premeditation and deliberation. Amyot was defendant's live-in girlfriend, and thus defendant had a relationship with the victim. His actions after the killing evince an attempt to cover-up his involvement in the crime. For example, he cautioned the twins to stay in the bedroom, changed his bloody clothes, washed up, and covered Amyot with a blanket. The circumstances of this grisly killing itself suggest premeditation. For example, while defendant's theory was self-defense, he remained on the couch during Amyot's alleged assaultive behavior, rather than getting off the couch and backing away from her. He struck the victim on the head with the vodka bottle, smashing it, before executing the fatal swipe, thus evidencing a sufficient interval of time to reconsider his use of the weapon and constituting a pause between the initial homicidal intent and the ultimate act. Finally, the wound's location on the neck, where vital arteries are close to the body's surface, evinces an intent to inflict a lethal wound, and there was sufficient time to form that intent. Moreover, the evidence clearly supported a finding of malice for purposes of second-degree murder.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could form the inferences necessary to convict defendant of first-degree murder, as well as second-degree murder.

Defendant next argues that the trial court improperly instructed the jury by failing to instruct them that, if the killing was an accident, they must acquit defendant of manslaughter or of any crime. However, not only were there no objections to the trial court's instructions, defense counsel said "No" when asked by the trial court whether there were any comments, corrections, or additions to the instructions. Thus, defendant has waived the issue for appellate review. *People v Matuszak,* 263 Mich App 42, 57; 687 NW2d 342 (2004). Defendant, however, also asserts ineffective assistance of counsel with respect to counsel's failure to challenge the instructions relative to the defense of accident. Voluntary manslaughter involves an intentional killing, and thus the defense of accident can be raised. *People v Hess,* 214 Mich App 33, 38; 543 NW2d 332 (1995). Accident is not a defense to involuntary manslaughter. *Id.* at 39. The trial court erred in *Hess* when the court instructed the jury that accident is not a defense to voluntary manslaughter. *Id.* at 38. Here, the trial court did not instruct the jury that accident was not a defense to voluntary manslaughter. Considering the jury instructions as a whole, they fairly presented the accident defense as applicable to voluntary manslaughter, thus sufficiently protecting defendant's rights. *People v McLaughlin,* 258 Mich App 635, 668; 672 NW2d 860 (2003). Furthermore, because the jury found defendant guilty of voluntary manslaughter, it

necessarily found that defendant acted with an intent to kill. If the jury had concluded that defendant's act was accidental, regardless of the accident instruction, the jury could not have convicted defendant of voluntary manslaughter. Defendant's ineffective assistance of counsel claim also fails for failure to establish prejudice.

Defendant next argues that the trial court committed error warranting reversal when it failed to charge the jury with an instruction for involuntary manslaughter. Defendant waived this issue for appellate review when trial counsel affirmatively stated that he had no comments corrections, or additions regarding the instructions. *Matuszak, supra* at 57. Once again, however, defendant presents an accompanying ineffective assistance of counsel argument.

To establish the crime of involuntary manslaughter, the prosecutor must prove beyond a reasonable doubt that the defendant acted in a grossly negligent, wanton, or reckless manner, so as to cause the death of another. *People v Moseler,* 202 Mich App 296, 298; 508 NW2d 192 (1993). Involuntary manslaughter is the unintentional killing of another person, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or the negligent omission to perform a legal duty. *Mendoza, supra* at 536. Involuntary manslaughter, as well as voluntary manslaughter, are necessarily included lesser offenses of murder, and if a defendant is charged with murder, an instruction on involuntary manslaughter must be given if supported by a rational view of the evidence. *Id.* at 541.

We find it unnecessary to determine whether a rational view of the evidence supported an involuntary manslaughter instruction. Assuming that there was sufficient evidence to support an instruction, defendant fails to overcome the presumption that counsel's decision not to request an involuntary manslaughter instruction was a matter of sound trial strategy. *People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel may have believed that he could convince the jurors that the killing was unintentional and that there was a lack of malice, thereby precluding convictions for the crimes of murder, first and second degree, and voluntary manslaughter, and he may not have wanted to allow the jury the "out" of finding defendant guilty of involuntary manslaughter in such a situation, thus forcing an acquittal. We are not prepared to find that counsel's performance was deficient.

Defendant's final argument is that he is entitled to resentencing on multiple grounds. Defendant is not entitled to resentencing for several reasons. With respect to the argument that defendant's sentence should not have been enhanced under MCL 769.10, second habitual offender, defendant was provided proper notice that the prosecution sought enhancement as indicated in the felony information, and the court treated defendant as a second habitual offender, and found him to be such an offender, at sentencing after defense counsel specifically agreed that defendant had a prior felony conviction. There was no claim that the notice was improper, nor any suggestion that defendant was not a second habitual offender. The PSIR indicates that defendant had one prior felony conviction. MCL 769.13(5) provides that the trial court makes the determination whether a defendant is an habitual offender at sentencing, or at a separate hearing on the matter, and prior convictions can be established by any relevant evidence, including information contained in the PSIR. This issue was effectively waived by defendant, and even if not waived, it is devoid of any merit. On appeal, defendant does not deny that he has a prior felony conviction. Defendant is a second habitual offender, and there was no error.

In regard to defendant's claim that the trial court, in determining the length of the sentence, improperly treated him as if he had murdered the victim, there is no basis for reversal. The crime was committed in 2002; therefore, the legislative sentencing guidelines were applicable. MCL 769.34(1) & (2). The minimum sentencing range was 36 to 88 months, and thus the sentence issued by the court was within the range. Pursuant to MCL 769.34(10), we are required to affirm a sentence within the guidelines range absent a scoring error or reliance on inaccurate sentencing information. There is no claim of any scoring errors or inaccurate sentencing information. Accordingly, we are mandated to affirm the sentence. We conclude, after review of all the sentencing arguments presented by defendant, that there is no basis to reverse or vacate the sentence.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell