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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2005
v	No. 251732 Wayne Circuit Court
WILLIE JAMES DANSBY, JR., Defendant-Appellant.	LC No. 03-005169-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to twenty-five to fifty years' imprisonment for the second-degree murder conviction, ten to seventeen years' imprisonment for the assault with intent to murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first claims that the trial court erred in refusing to instruct the jury on voluntary manslaughter. Defendant also argues that the trial court erred in failing to *sua sponte* instruct the jury on involuntary manslaughter. We disagree.

This Court reviews preserved claims of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). An instruction need only be given if it is supported by the evidence, and a trial court has discretion to determine whether an instruction is applicable. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998) (citations omitted). A forfeited error may not be considered by this Court unless the error was plain, and it affected the defendant's substantial rights. *People v Gonzalez,* 468 Mich 636, 644; 663 NW2d 159 (2003).

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A lesser offense is necessarily included if its elements are completely contained in the greater offense. *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003), citing *Cornell, supra* at 356. With respect to voluntary and involuntary manslaughter, the Michigan Supreme Court has held:

> [T]he elements of voluntary and involuntary manslaughter are included in the elements of murder. Thus, both forms of manslaughter are necessarily included lesser offenses of murder. Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also "inferior" offenses within the scope of MCL 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence. [*Mendoza, supra* at 541, citing *Cornell, supra* at 357.]

In the present case, a rational view of the evidence did not support an instruction for voluntary manslaughter. Defendant steadfastly maintained that he was not "angry," he was merely "upset." Defendant's own testimony, therefore, negates the inference that he acted "under the influence of passion or in heat of blood." *Mendoza, supra* at 535. Additionally, even if the victims acted as defendant claimed, banging and kicking the door, shouting curse words toward the house, and shutting off the power to defendant's house were not adequate provocation to move a reasonable person to commit homicide. Furthermore, the time period between the victim's alleged original actions and the subsequent confrontation should have been reasonably sufficient to allow defendant's blood to cool.

Even though imperfect self-defense was never specifically brought to the trial court's attention, defendant was not entitled to an instruction on voluntary manslaughter based on a theory of imperfect self-defense. Imperfect self-defense may diminish second-degree murder to voluntary manslaughter. *People v Kemp,* 202 Mich App 318, 323; 508 NW2d 184 (1993). Imperfect self-defense is usually invoked when the defendant would have been able to claim self-defense if he had not been the initial aggressor. *Id.* In the present case, defendant claimed that Perkins and Ivery were the initial aggressors. Accordingly, defendant was not entitled to the instruction.

Moreover, "a person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002) (footnote omitted). Therefore, because defendant testified that one victim had a gun and the other victim was entering his home on the first victim's orders, defendant was entitled to an instruction on self-defense as a complete defense, which is what the court gave. Defendant's own testimony did not support a voluntary manslaughter instruction under a theory of imperfect self-defense. The trial court did not abuse its discretion in finding that the evidence did not support an instruction on voluntary manslaughter.

With regard to defendant's argument that the trial court should have instructed the jury on involuntary manslaughter, because defendant never requested the instruction, this issue is reviewed only for plain error affecting defendant's substantial rights. *Gonzalez, supra* at 643. Defendant must show that:

> "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." In addition, defendant must show that the "error resulted in the conviction of an actually innocent defendant" or that the "error 'seriously

> affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . .'" [*People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).]

No plain error occurred in this case. First, the trial court has discretion in determining whether the evidence supports instructing the jury on a particular charge. *Ho, supra* at 189. Even if defendant had requested an instruction on involuntary manslaughter, the trial court would have been within its discretion to deny the request. Defendant testified that he closed his eyes and shot the gun at the one victim because the other victim was holding a gun and told the first victim to "get him." Although defendant claims that he did not anticipate shooting anyone when he got the gun, defendant intended to shoot the victim when he aimed it at him and pulled the trigger. Moreover, defendant hit the victim in the center of his chest. Defendant's actions demonstrated "an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result," rather than the lesser mens rea required for involuntary manslaughter. *Mendoza, supra* at 540-541. Therefore, the trial court did not err in failing to *sua sponte* instruct the jury on involuntary manslaughter, making it unnecessary to apply the remainder of the plain error test set forth in *Carines, supra*.

Next, defendant argues that the trial court's admission of testimony pertaining to his request for an attorney during a police interview violated his Fifth Amendment rights against self-incrimination and to due process, requiring reversal of his convictions. We disagree.

Defendant's claims on appeal involve both preserved and unpreserved, nonstructural constitutional error. Therefore, the preserved claim requires reversal unless the error is harmless beyond a reasonable doubt, and the unpreserved claim is reviewed only for plain error. *Cornell, supra* at 362-363. "The Fifth Amendment and Const. 1963, art. 1, § 17 provide that no person shall be compelled to be a witness against himself or herself in a criminal trial." *People v Belanger*, 454 Mich 571, 578; 563 NW2d 665 (1997) (citation omitted). In *Belanger,* the Court found that the prosecutor's comment about the defendant's exercise of his constitutional right to counsel was not harmless beyond a reasonable doubt. *Id.*

> [I]t is fundamentally unfair to assure a suspect that his silence will not be used against him and then to use that silence to impeach him at trial. *Wainwright v Greenfield,* 474 US 284, 293; 106 S Ct 634, 639-40; 88 L Ed 2d 623 (1986). The Court held that a prosecutor's use of a defendant's request for counsel to establish that defendant's sanity violates the constitutional protection of due process. *Id.* at 290-292, 106 S Ct at 637-39. [*Id*. at 577.]

Initially, there appears to be little distinction between using the defendant's request for counsel to establish the defendant's sanity in *Belanger,* and the prosecutor's use in the present case to establish that defendant was not in shock at the time of the interview. However, the difference between the facts in *Belanger, supra,* and those in the present case is a matter of degree. In *Belanger*, the prosecutor not only inquired into whether the defendant cut off the interrogation by asking for a lawyer, but the prosecutor argued that the defendant's request for a lawyer raised an inference of guilt when he stated, "[w]hen somebody asks for a lawyer they know they're in trouble," during closing argument. *Belanger*, *supra* at 577-578. The Court noted that the facts in *Belanger* relating to the defendant's insanity defense were closely

contested, with several experts' opinions to weigh, and the jury was asked to determine the defendant's state of mind during a narrow time period. *Id*. at 578. The Court held that, given the closely contested nature of the case, it was unable to determine that the constitutional error was harmless beyond a reasonable doubt and granted the defendant a new trial. *Id*. at 578-579.

The present case does not present a close issue. First, defense counsel was the first to raise defendant's request for counsel when he asked defendant, "And at the end of the statement you told [the police] you wish to see a lawyer; didn't you say that?" The prosecutor then asked a rebuttal witness about the very same subject, and defendant did not object. In fact, defense counsel brought up the subject again on cross-examination, over the prosecutor's objection, asking the detective if she saw "anything improper or wrong about [defendant] asking for a lawyer."

The only time defendant ever challenged questions regarding his invocation of his right to counsel was when the prosecutor asked King on re-direct, "Did you find it peculiar as to when it was that [defendant] asked for his lawyer?" Even then, defendant's objection was not clear and specific. Nonetheless, the court stated that it understood defendant's objection but ruled to allow the question because it had previously allowed defense counsel, over the prosecution's objection, to ask King whether it was improper to ask for a lawyer. Additionally, the prosecution never argued that defendant's invocation of his right to counsel raised an inference of guilt. In contrast to *Belanger, supra*, defendant's request for counsel was not used to prove defendant's sanity at a crucial period, but to impeach defendant's credibility by showing that his selective forgetfulness over twenty-four hours after the shooting was fabricated and not the result of any shock.

Additionally, there was a substantial amount of evidence from which the jury could have determined that defendant was lying about being in shock during the police interviews. Defendant read his rights aloud; initialed each of those rights; gave a three-page statement to the police; signed each page; and gave the police a large amount of detailed information, including addresses, telephone numbers, his social security number, where he went to high school, and how much education he received. Two officers testified that defendant was lucid during both interviews and he was able to clearly answer their questions. In light of this evidence and evidence of defendant's guilt, there is no reasonable likelihood that the prosecutor's questioning into defendant's request for counsel affected the outcome of the trial. The trial court's admission of this very brief testimony relating to defendant's request for a lawyer, therefore, does not entitle defendant to a new trial.

Defendant next argues that his trial counsel's failure to challenge the prosecutor's initial question regarding defendant's request for a lawyer denied him constitutionally effective assistance of counsel. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, whereas questions of constitutional law are reviewed de novo. *Id*. However, because no evidentiary hearing was held, there are no findings of fact for this Court to review.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole,* 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

With regard to defense counsel's questions about defendant's request for counsel, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003). "'[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,' which we will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), quoting *Rockey, supra* at 76. Even if defense counsel's strategy was not reasonable, however, defendant would still not meet his burden of establishing ineffective assistance of counsel because, as explained in this Court's discussion of defendant's Fifth Amendment violation claim, defendant cannot show that, but for counsel's error, the result of the trial would have been different.

Finally, defendant argues that the trial court had no authority to *sua sponte* set aside his original sentence of fifteen to twenty-five years for his second-degree murder conviction and resentence him to twenty-five to fifty years. We disagree with defendant's characterization that the trial court "set aside" a sentence.

"A trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid." *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003). "A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts. This Court has also repeatedly held that a sentence is invalid if it is based on inaccurate information." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997)(internal citations omitted). The record indicates that the original sentence of fifteen to twenty-five years' imprisonment for defendant's second-degree murder conviction was within the correct sentencing guidelines range and based on accurate information.

"'[A] trial court cannot set aside a valid sentence and impose a new and different one, *after the defendant has been remanded to jail to await the execution of the sentence*.'" *People v Barfield*, 411 Mich 700, 703; 311 NW2d 724 (1981), quoting *In re Richards,* 150 Mich 421, 426; 114 NW2d 348 (1907). Here, defendant left the courtroom but had not left the building when the trial court realized it misspoke, called the parties back, and imposed the higher sentence, which was also within the guidelines.

It is well established that courts speak through their judgments and decrees, not their oral statements or written opinions. *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993), citing *People v Stackpoole,* 144 Mich App 291, 298; 375 NW2d 419 (1985). Additionally, the court may correct clerical mistakes in judgments at any time on its own initiative. MCR 6.435(A). Because the trial court never entered an order based on the original sentence that it stated during the sentencing hearing, there was no judgment of sentence to modify. MCR 6.427. The trial court, therefore, did not exceed its authority in recalling defendant to the courtroom five minutes later to correct its previous misstatement.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens