

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLYDE A. WHITE,

Defendant-Appellant.

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UNPUBLISHED

February 5, 1999

No. 196764

Recorder's Court

LC No. 95-010020

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for second-degree murder, MCL 750.317; MSA 28.549. Defendant killed a man who was apparently supplying drugs to him in the course of an attempted robbery. The court sentenced defendant to twenty-five to fifty years' imprisonment. We affirm.

Defendant first argues that his second-degree murder conviction was not supported by sufficient evidence. We disagree. When considering whether there was sufficient evidence to convict a defendant, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

The elements of second-degree murder are: "(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). The Michigan Supreme Court has defined malice 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." *Id.* at 464.

The victim here had been shot four times and, although none of the shots were to the head or upper torso, the victim's cause of death was multiple gunshot wounds. A witness testified that he was with the victim on the day of the shooting and saw defendant shooting at him. After the victim dove

onto his bed, defendant continued shooting at the victim as he lay there. Defendant left the victim's house immediately after the shooting. This evidence, viewed in a light most favorable to the prosecutor was clearly sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant had committed second-degree murder.

Defendant next argues that the trial court erred in denying defendant's motion for a directed verdict. However, defendant withdrew his motion for a directed verdict before the trial court could rule on the motion. This issue, therefore, is without merit because the trial court did not rule on a motion for a directed verdict by defendant.

Defendant next argues that he was denied effective assistance of counsel. We again disagree. Because defendant has not moved for a new trial or an evidentiary hearing before the trial court, review is limited to the existing record. *Id.* To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that under an objective standard of reasonableness counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant and the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant claims, first, that his trial counsel was ineffective because he presented relatively few witnesses to support defendant's claims, and because the private investigator that defense counsel retained failed to provide any further support to defendant's claims. Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, defendant failed both to identify any other witnesses who would have supported his claim and to indicate the substance of their potential testimony. Defendant also failed to indicate the defects in the work of the private investigator. Therefore, defendant has failed to show that he was denied a substantial defense by either trial counsel's failure to call more witness or trial counsel's retention of this particular private investigator.

Defendant next argues that defense counsel was ineffective because he did not allow defendant to testify. The trial court specifically questioned defendant regarding whether he understood that he had the right to testify on his own behalf. Defendant acknowledged that he understood his right and, after talking it over with his lawyer, he decided not to testify. Advising a defendant not to testify on his own behalf is a matter of trial strategy. *People v Tammolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). This Court does not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987).

Defendant next argues that trial counsel was ineffective for failing to sufficiently impeach a witness. Review of the lower court record reveals that the witness in question was the subject of rigorous cross-examination in an attempt to impeach his testimony. Trial counsel's decision not to delve

into every conceivable difference between the witness' testimony at trial and his prior testimony and inconsistent statements constituted a matter of trial strategy for which this Court will not substitute its judgment. *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987).

Defendant's final argument relating to the effectiveness of his trial counsel concerns the latter's failure to object to allegedly leading questioning of several police officers. However, defendant has failed to state which particular questions defense counsel should have objected to and has failed to show that the result of the proceeding would have been different if there had been an objection to any of the questions posed to police officers.

Defendant next argues that the trial court erred in denying defendant's motion to suppress his confession given while in police custody either because it was wholly fabricated by the police, because it was obtained unconstitutionally, or because defendant did not understand the nature of his constitutional rights.<sup>1</sup> We disagree.

This Court must give deference to the trial court's findings at a suppression hearing. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996). This Court reviews de novo the entire record, but will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights "unless that ruling is found to be clearly erroneous." *Id.* "Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." *Id.*

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived certain rights set forth by the U.S. Supreme Court in *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Garwood*, 205 Mich App 553, 555-56; 517 NW2d 843 (1994). When a defendant challenges the admissibility of his statements, the trial court must hear testimony regarding the circumstances of such statements outside the presence of the jury. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). Whether the defendant's waiver, and his subsequent statements to the police, were undertaken in a knowing, intelligent, and voluntary manner is a question which the court must determine after assessing the totality of the circumstances. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). Such circumstances include "the age, education, intelligence level, and experience of the defendant, the duration of the defendant's detention and questioning, the defendant's mental and physical state, and whether the defendant was threatened or abused." *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998). However, a single factor is not determinative, and in order to establish a valid waiver of a defendant's *Miranda* rights, "the prosecutor need only prove that the defendant was aware of his available options." *Id.* at 182.

Defendant's testimony regarding how his statement was obtained directly conflicted with the two police witnesses that testified at the *Walker* hearing. Hence, the trial court had to make a credibility determination; it concluded that defendant was less credible than the other witnesses. The relevant evidence, therefore, showed that defendant was a high school graduate and that he could read and write. He was not threatened or abused in any way by the police interrogators during a detention that lasted three days. On each of the first two days, defendant was questioned for a brief period of time

after having waived his *Miranda* rights. Finally, on the third day of custody, after having been positively identified in a line-up, defendant again waived his *Miranda* rights and finally implicated himself in a statement. Considering the totality of the circumstances, defendant's waiver and subsequent statement of confession were knowingly, intelligently, and voluntarily made. Therefore, the trial court's finding that defendant's confession was voluntary was not clearly erroneous.

Defendant's final issue is that the trial court committed error requiring reversal when it refused to instruct the jury on the defenses requested by defendant. We disagree. Where a defendant does not request an instruction at trial or object to the trial court's instructions to the jury, this Court will review the issue only to determine if manifest injustice resulted. *People v Malenski*, 220 Mich App 518, 521; 560 NW2d 71 (1996).

To decide if the defendant has suffered manifest injustice, the reviewing court "is to balance the general correct, clear tenor of the instructions in their entirety against the potential misleading effect of a single sentence isolated by a defendant." *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Jury instructions must include all of the elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW 2d 830 (1994). No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-78; 561 NW 2d 463 (1997). Even if the instructions to the jury are imperfect, they do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW 2d 1 (1996).

Defendant argues, first, that the trial court erred by denying his request that the jury be instructed on the intent to kill based on the nature and location of the bullet wounds. The trial court properly instructed the jury on the law regarding intent and, although defendant may have desired a more elaborate instruction, the instruction given fairly presented the issue of intent and sufficiently protected defendant's rights. *Davis, supra* at 54.

Defendant next argues that the trial court should have instructed the jury more elaborately concerning the issue of credibility, particularly the credibility of the prosecution's main witness. On the issue of credibility, the trial court instructed the jury specifically regarding how to assess the credibility of that witness in light of prior inconsistent statements and testimony. The trial court also gave the standard jury instruction regarding the credibility of witnesses, CJI2d 3.6. In our judgment, the trial court's instructions fairly presented the issue of the credibility of witnesses and sufficiently protected defendant's rights. *Davis, supra* at 54.

Defendant also argues that the trial court should have instructed the jury regarding defendant's alibi; however, defendant failed to request such an instruction. When proper instructions are given on the elements of the offense and reasonable doubt, failure to give an unrequested alibi instruction is not error requiring reversal. *People v Hines*, 88 Mich App 148, 155; 276 NW2d 550 (1979). The trial court fully instructed the jurors regarding defendant's presumption of innocence, the prosecution's burden to establish guilt beyond a reasonable doubt, the elements of the crimes with which defendant was charged, and appropriate factors to consider in evaluating evidence and witness credibility.

Therefore, because the jury instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights, there was no error.

Affirmed.

/s/ Helene N. White

/s/ Stephen J. Markman

/s/ Robert P. Young, Jr.

<sup>1</sup> However, defendant never argued below that he did not understand the nature of his constitutional rights. Therefore, defendant has waived the latter claim.