STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 1999
v	No. 205583 Oakland Circuit Court
TRACY SCHAFER, Defendant-Appellant.	LC No. 96-144749 FC

Before: Markey, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to eighteen to thirty years' imprisonment for the murder conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first contends that her post-polygraph confession to the police, in which she admitted that she killed her husband, was constitutionally infirm and should have been suppressed on a number of grounds. We disagree.

While the issue of the voluntariness of a confession is a question of law for the trial court, this Court must engage in a de novo review of the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998); *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994). However, this Court defers to the trial court's superior ability to assess the weight of the evidence and will not reverse the trial court's factual findings unless they are clearly erroneous. *Jobson, supra* at 710; *People v Johnson*, 202 Mich App 281, 288; 508 NW2d 509 (1993). A trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

A

Defendant's claim that her confession was involuntary because it was induced by promises of leniency and by threats is not supported by the record. The record reveals that the officers merely told defendant to tell the truth and that she could "help herself" if the truth revealed that her actions were not premeditated. See *People v Conte*, 421 Mich 704, 740 (Williams, C.J.); 365 NW2d 648 (1984) ("[M]ere adjurations or exhortations to tell the truth, without more, are insufficient to vitiate the voluntariness of a confession"); *People v Carigon*, 128 Mich App 802, 809-812; 341 NW2d 803 (1983) (statement to the effect that things would go easier for the defendant if he confessed held not to constitute an improper promise of leniency). Similarly, the record is devoid of any evidence to suggest that her confession was induced by threats. The officer's statement that "[W]e're going to lodge you in jail, we're going to charge you with Homicide, and we're going to ask you to be held without bond" was not a threat, but rather, merely a factual assertion which would be carried out irrespective of a confession.

B

Defendant also claims that her confession was involuntary because she was not readvised of her *Miranda*[1] rights during the interview with the police that occurred shortly after the polygraph examination had concluded and once she was placed in custody. Again, we disagree.

The failure of the police to readvise a defendant of his or her constitutional rights after a prior interrogation or polygraph examination does not render the defendant's subsequent statements inadmissible. *People v Ray*, 431 Mich 260, 275-276; 430 NW2d 626 (1988); see *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986) ("[T]he *Miranda* rights are not a liturgy which must be read each time a defendant is questioned"). Rather, the admissibility of post-polygraph interview statements depends upon whether the defendant's waiver of his or her rights was knowing and voluntary under the totality of the circumstances. *Ray*, *supra* at 276; *Godboldo*, *supra* at 607.

When defendant voluntarily appeared for a polygraph examination, the examiner gave her a written form advising her of her *Miranda* rights with regard to the polygraph examination, which defendant initialed and signed. The examiner then verbally advised defendant of her *Miranda* rights without reference to the polygraph. Defendant again acknowledged her rights and waived them.

A few minutes after the examination and approximately two hours after she had been Mirandized, defendant agreed to speak with the police sergeants who ultimately took her confession. Although defendant was not reapprised of her rights, the officers twice asked defendant if she remembered being advised of those rights, if she understood her rights and understood that they still applied. Defendant responded affirmatively and expressed her intent to speak with the officers. The questioning commenced and continued until defendant was eventually placed in custody, confessed to the murder of her husband, and reduced her statement to writing. Immediately thereafter, another officer inquired whether defendant understood her rights and understood that they still applied.

Defendant again responded that she understood, and that she was still willing to waive her rights and again stated that she was responsible for her husband's death. At no time during the interview did defendant request counsel or refuse to speak with the officers.

Under these circumstances, we hold that the court did not clearly err in finding that defendant's statement was voluntary. Accordingly, the court did not err in denying defendant's motion to suppress her statement and in admitting the statement at trial.

II

Next, defendant argues that the trial court abused its discretion in denying her request for a continuance of the *Walker*[2] hearing to allow her to obtain an expert to offer an opinion that, because of her mental state, defendant was incapable of making a knowing and voluntary confession. One of the factors we weigh in determining whether the trial court abused its discretion by denying a defendant's request for an adjournment is whether the defendant has "'demonstrated prejudice resulting from the trial court's [alleged] abuse of discretion.'" *Lansing v Harsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995), quoting *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). We conclude that defendant has failed to do so.

Although Dr. Van Horn did not testify at the *Walker* hearing, she testified at trial regarding the contents of her report on the defendant's condition to buttress the defense of diminished capacity. After a thorough review, we conclude that there is no reasonable likelihood that Dr. Van Horn's trial testimony would have overcome the strong evidence that defendant's condition on the date she made the statement rendered her capable of knowingly and voluntarily waiving her rights. The polygraph examiner and the two officers who interviewed defendant all testified that defendant appeared to be in good physical condition, that any drugs she may have ingested did not affect her cognitive ability, and that there was nothing to suggest that she needed medical or psychological treatment. Under the facts presented here, the trial court did not abuse its discretion in denying defendant's request for a continuance.

III

Defendant next argues that her convictions must be reversed because the trial court denied her request to instruct the jury on involuntary manslaughter. We find that any error in the trial court's refusal to give the requested instruction was harmless.

In the present case, the jury was instructed on first-degree premeditated murder and the lesser offenses of second-degree murder and voluntary manslaughter. Although faced with the option of convicting defendant of the lesser offense of voluntary manslaughter, the jury convicted her of the greater charge of second-degree murder. The jury's rejection of the intermediate charge of voluntary manslaughter indicates "a lack of likelihood that the jury would have adopted the lesser requested charge" of involuntary manslaughter. *People v Beach* 429 Mich 450, 481, 490-491; 418 NW2d 861 (1988). In such a case, any error in the trial court's failure to instruct the jury on involuntary

manslaughter was harmless. *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992); *Beach, supra* at 490-491.

IV

Defendant next argues that the trial court erred in refusing to instruct the jury on voluntary intoxication and accident. We disagree.

Jury instructions are reviewed in their entirety to determine whether there is error requiring reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Even if instructions are somewhat imperfect, there is no error if the instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.*; *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997). In addition, 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, 177-178; 561 NW2d 463 (1997).

In the present case, the trial court did not err in refusing to instruct the jury on voluntary intoxication instruction. Reviewing the jury instructions in their entirety, we hold that the issue of intoxication was sufficiently covered by the court's diminished capacity instruction which informed the jury that it could consider defendant's drug use in determining whether she possessed the requisite intent to commit first-degree murder. Thus, the issue of intoxication as negating the element of specific intent was clearly conveyed to the jury. Regardless, any error in refusing to instruct the jury was harmless because defendant was convicted of second-degree murder, a general intent crime, to which voluntary intoxication is not an available defense. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

Concerning the requested accident instructions, we conclude that both instructions were inappropriate in this case. Assuming without deciding that the evidence could support an accident instruction, defendant did not argue this evidence or assert the defense of accident as a theory of the case; rather, the record clearly shows that defendant's theory was diminished capacity. Indeed, defense counsel, in opening statement and closing argument and through the presentation and cross-examination of witnesses, expressly asserted that he was pursuing a defense of diminished capacity. Under these circumstances, the trial court properly refused to instruct the jury on the defense of accident. See *People v Morris*, 99 Mich App 98, 100-101; 297 NW2d 623 (1980) (the trial judge in a homicide case did not err in failing to sua sponte instruct on the theory of accidental homicide where the entire record reveals a defense based upon diminished capacity of the defendant rather than accident). Notwithstanding this, however, any error in refusing to give the requested instruction on "accident as a defense to a specific intent crime" was harmless because defendant was convicted of second-degree murder, a general intent crime, to which the instruction, on its face, does not apply. See *Goecke, supra* at 464.

V

Defendant's final challenge is to the trial court's admission of two photographs of the victim. In *People v Zeitler*, 183 Mich App 68, 69-70; 454 NW2d 192 (1990), this Court summarized the standard for admitting photographic evidence as follows:

> Generally, the admission of photographic evidence is within the discretion of the trial court. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). Photographs are not inadmissible merely because they are gruesome and shocking. *People v Stewart*, 126 Mich App 374, 377-378; 337 NW2d 68 (1983). However, such photographs should not be admitted if their probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Turner*, 17 Mich App 123, 130; 169 NW2d 330 (1969). The danger is that exposure to vivid and gruesome images of the victim will cause a juror to forget that the defendant may not be responsible for the outrage. *People v Bryant*, 129 Mich App 574, 581; 342 NW2d 86 (1983).

See also *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998); *People v Howard*, 226 Mich App 528, 554-550; 575 NW2d 16 (1997).

We find no abuse of discretion here. The photographs at issue tended to support the prosecutor's theory that the victim had been shot in the back of the head at close range while he was sleeping, causing the blood flow from his mouth onto the bed, and not during a struggle as advanced by the defense. Moreover, it is unlikely that the photographs, which were not particularly gruesome and did not depict the actual gunshot wound inflicted, prejudiced defendant or inflamed the jury to such an extent that they lost focus of the issues to be decided. Finally, defendant's assertion that the photographs were prejudicial because they were cumulative to testimony elicited at trial lacks merit. See *People v Curry*, 175 Mich App 33, 46; 437 NW2d 310 (1989) (autopsy photographs depicting the location and nature of the victim's wounds were properly used to complement the testimony of the physician who performed the autopsy).

Affirmed.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

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

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