STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2000
v	No. 204925 Recorder's Court
THOMAS LAMAR WALKER, Defendant-Appellant.	LC No. 96-502042

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, 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). He was sentenced to thirty-five to sixty years' imprisonment for the murder conviction, to be served consecutively to two years' imprisonment for the felony firearm conviction. Defendant appeals as of right, and we affirm.

On May 1, 1996, the victim, Christopher Rugg, left messages for family members that he had been "robbed" and would rectify the problem. Later that day, the victim was found shot in the head and chest laying on Henry Ruff Road. Police arrested defendant, Antonio Peay, and David Johnson. Johnson allegedly gave a statement to police indicating that Peay and defendant had shot the victim. However, at the preliminary examination and at trial, Johnson denied giving any statement, although he admitted that his signature did appear on the advice of rights form. Defendant also signed an advice of rights form, but spoke to police. Initially, defendant denied any involvement in the shooting. However, as questioning continued, defendant told police that the victim approached the men with a gun. Peay drew his weapon and shot at the victim. The victim began to run with defendant and Peay in pursuit. Although the victim was nearly hit by a car, he continued to flee. Defendant and Peay continued their pursuit and fired at the victim. At trial, defendant's girlfriend testified that she was with defendant that day, and they learned of the shooting when they returned from grocery shopping.

Defendant first argues that a "defective bindover" occurred when the prosecution failed to present sufficient evidence of premeditation to support a charge of first-degree murder and caused a

compromise verdict at trial. We disagree. While our review of the circuit court's analysis of the bindover decision is de novo, we review the magistrate's determination for an abuse of discretion. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). The magistrate must examine the evidence to determine if there is support for each element of the crime charged or evidence from which the elements can be inferred. *Id*. The defendant's intent presents a question of fact to be inferred from the circumstances by the trier of fact. *People v Tower*, 215 Mich App 318, 323; 544 NW2d 752 (1996). Accordingly, the magistrate did not abuse its discretion based on the bindover of first-degree premeditated murder. *McBride, supra*. Furthermore, defendant has failed to identify any basis in the record for the conclusion that the verdict was the product of juror compromise. *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998).

Defendant next argues that there was insufficient evidence to support defendant's second-degree murder conviction. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "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). Specifically, defendant challenges the malice element of second-degree murder, arguing that there was adequate and reasonable provocation to negate the element. In support, defendant cites to the victim's "armed attack" that caused defendant's "heated response" in self-defense that mitigated the murder to manslaughter. In order to establish lawful self-defense, the circumstances, as they appeared to the defendant, must result in a reasonable belief that the defendant was in danger of death or serious bodily harm. *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982). There is no evidence in the record addressing defendant's subjective belief of harm because his theory at trial was an alibi defense. Furthermore, we note that imperfect self-defense is a qualified defense that may mitigate second-degree murder to voluntary manslaughter. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). However, the doctrine is invoked only where the defendant would have been entitled to self-defense had he not been the initial aggressor. *Id*. In the present case, defendant asserted that the victim was the initial aggressor and did not, on the record, assert imperfect self-defense. Accordingly, defendant's contention, that there was insufficient evidence of second-degree murder because the element of malice was negated, is without merit.

Defendant next argues that the trial court erred in allowing inadmissible hearsay evidence before the jury under the guise of impeachment. We disagree. The admission of evidence is reviewed for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). At the preliminary examination and at trial, Johnson denied that he gave a statement to police regarding the shooting. Rather, Johnson testified that he was not home at the time of the shooting. The prosecutor questioned Johnson about a prior inconsistent statement given to police wherein he acknowledged that he was with Peay and defendant when the victim arrived on the scene. Johnson acknowledged that his signature appeared on the advice of rights form and acknowledged that his signature appeared at the bottom of the sheet containing a statement. On cross-examination, Johnson, upon leading questioning by defense counsel, acknowledged that his name was signed on the second document, but was not his signature. The prosecution was entitled to examine Johnson regarding prior statements. MRE 613(a).

A prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case. *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997). In the present case, the testimony was relevant to show Johnson's knowledge regarding actions that occurred just prior to the shooting and whether he was present on the scene during the events or out of town. *Id*. at 683-684. Accordingly, there was no abuse of discretion in the admission of the prior inconsistent statement. *Murray, supra*.

Defendant next argues that the trial court erred in admitting "hearsay documents" that contained Johnson's signature. While defendant classifies the evidence as hearsay, defendant has failed to cite any authority to support this blanket assertion. A party may not leave it to this Court to search for authority to sustain or reject its position. *People v Hunter*, 202 Mich App 23, 27; 507 NW2d 768 (1993). Accordingly, we decline to address defendant's argument. In any event, we note that the trial court cautioned the jury that the evidence was not for substantive purposes.

Defendant next argues that the trial court abused its discretion when it allowed evidence to be "altered." We disagree. The victim left a message with his brother that indicated that he had been "robbed," and that he was going after the robbers. The victim used a racial slur to refer to the robbers. When trial commenced, the prosecutor moved to omit the racial slur, arguing that the prejudicial effect outweighed any probative value. Defense counsel opposed the motion, stating that the message indicated the "anger" of the victim and should remain intact. The trial court granted the prosecutor's motion to delete the racial slur. However, when the statement was presented to the jury, the racial slur was replaced with the word "guys." After the statement was presented to the jury, defense counsel stated that he had the same objection previously raised and "at a later time I [he] would like to correct the record." Defense counsel did not place any other objections on the record. The next day, defense counsel stated that he had discussed the statement read into evidence after the jury left. Defense counsel then stated that the statement was altered "over my [his] objection," and he wanted the record to be clear as to how the words "those guys" got into the statement. The trial court stated that it believed that the parties would confer regarding the matter prior to admission of the statement. However, even though the word "guys" was inserted unbeknownst to defense counsel, any error appeared to be harmless. At that time, defense counsel acknowledged that he "knew about it ahead of time" because the prosecutor had shown him the form, but he did not have a chance to put it on the record when the changes were made.

Admission of evidence is reviewed for an abuse of discretion. *Murray, supra*. An evidentiary issue is preserved for review when the party opposing the admission of evidence objects at trial and specifies the same ground for objection that is asserted on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). To be timely, an objection should be interposed between the question and the answer. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). In the present case, defense counsel did not timely object despite the fact that he was aware of the deletion and insertion of the word "guys" prior to admission at trial. Furthermore, at the time of admission, defense counsel did not indicate that he had an objection, but rather stated that at a later time, he would like to "correct" the record. Because defense counsel did not timely "object" and did not provide an

evidentiary basis for his "objection," this issue is not properly preserved for appellate review. *Weiss, supra*.

Defendant next argues that the trial court erred in failing to suppress the incriminating statement attributed to defendant because it was a summarized statement, it was involuntary due to police misconduct, and it violated defendant's right to remain silent. We disagree. Defendant's contention that a paraphrased or editorialized account of any statement could not be admitted has been rejected by this Court. *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984). The voluntariness of a statement is to be determined using a totality of the circumstances analysis. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). The voluntariness of a confession is a question for the trial court, but we examine the entire record and make an independent determination of voluntariness. *Id*. at 68. The trial court's decision will not be disturbed unless it is clearly erroneous. *Id*. A decision is clearly erroneous when it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Hampton*, 237 Mich App 143, 148; 603 NW2d 270 (1999).

The test of voluntariness is whether, in light of the totality of all surrounding circumstances, the confession was the result of free and unconstrained choice or whether it was the result of overborne will. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Review of the facts presented at the *Walker*[1] hearing reveals that defendant was advised of his rights, understood them, and knowing and intelligently waived them. Officer Fetner made no threats or promise to induce defendant's statement. There is no evidence of psychological coercion as a result of Officer Fetner's relaying his own personal experience. Accordingly, we cannot conclude that the trial court's determination of voluntariness was clearly erroneous. *Sexton, supra*.

Defendant's contention that police continued to question him after he invoked his right to remain silent is without merit. A refusal to make a statement is not an assertion of the right to remain silent that would prohibit the police from later asking questions. *People v Hampton*, 138 Mich App 235, 237; 361 NW2d 3 (1984). Accordingly, defendant's refusal to reduce his statement to writing does not serve as an invocation of the right to remain silent that would prohibit later police questioning.

Defendant next argues that trial counsel was ineffective for failing to move for a directed verdict, failing to move for exclusion of tainted ballistic evidence, failing to object to the representation of the jury venire, failing to advise defendant of his right to testify, and failing to ensure fair conditions at trial. We disagree. 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). When reviewing a claim of ineffective assistance, we examine whether counsel's performance was objectively unreasonable and whether the defendant was prejudiced by counsel's defective performance. *Id*. We will not assess counsel's performance with the benefit of hindsight. *Id*. at 77. Our review is limited to mistakes apparent in the record in the absence of a testimonial record. *Id*. After a thorough review of the record, we conclude that defendant received effective assistance of counsel.

---

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

Defendant next argues that the trial court's failure to obtain a waiver of defendant's right to testify on the record requires a new trial. We disagree. The trial court has no such duty. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995).

Defendant next argues that his sentence violates the principle of proportionality. We disagree. We review the sentence imposed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). A sentence constitutes an abuse of discretion if it violates the principle of proportionality. *Id*. That is, a sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Mulbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). However, the key test of proportionality is not whether the sentence departs from or adheres to the recommended guidelines range, but whether it reflects the seriousness of the matter. *Cain, supra* at 132. Based on the circumstances surrounding the victim's death, we cannot conclude that the sentence imposed constitutes an abuse of discretion.

Affirmed.[2]

/s/ Harold Hood
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

[2] Defendant also argues that the cumulative effect of errors requires a new trial. Our disposition of the other issues renders this claim moot.