STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GUY McKENZIE,

Defendant-Appellant.

UNPUBLISHED
February 20, 2001

No. 214095
Wayne Circuit Court
Criminal Division
LC No. 97-001353

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of voluntary manslaughter, MCL 750.321; MSA 28.553, and sentenced on May 29, 1998, to ten to fifteen years' imprisonment. He appeals as of right. We affirm.

Defendant was initially bound over for trial in 1995 on first-degree murder, however that charge was dismissed without prejudice when a prosecution witness was unavailable for trial. After a second preliminary examination, the district court concluded that there was no evidence of premeditation and bound defendant over on a reduced charge of manslaughter. The prosecutor filed a delayed application for leave to appeal in the trial court from the district court's reduced bindover. The trial court ultimately granted the application and reinstated the murder charge.

Defendant argues that the trial court lacked jurisdiction because the prosecutor failed to file a timely application for leave to appeal or a timely motion to amend the information. In *People v Goecke*, 215 Mich App 623, 626-627; 547 NW2d 338 (1996), this Court held that a prosecutor was required to file an application for leave to appeal in order to challenge a reduced bindover. However, the Supreme Court in its reversal of *Goecke*, held that an application for leave to appeal was not required and that a simple motion to amend the information was sufficient. *People v Goecke*, 457 Mich 442, 458, 473; 579 NW2d 868 (1998). In this case, the prosecutor was not required to file an application for leave to appeal, but did so anyway. The trial court had jurisdiction over the matter. Defendant's contention that the delayed nature of the application prevented the trial court from exercising jurisdiction is without merit. A delayed application for leave to appeal is specifically authorized by court rule. See, e.g., MCR 7.103(B)(6); MCR 7.205(F)(1).

Defendant next argues that the trial court erred by reinstating the charge of first degree murder. We disagree. First-degree, premeditated murder requires proof "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998).

At the first preliminary examination, defendant's girlfriend testified that she saw defendant stab the victim in the back as the victim was leaving the house that she shared with defendant and their three children. However, at the second preliminary examination, she recanted that testimony and claimed only that the stabbing occurred during a fight between defendant and the victim. The district court considered her testimony from the first preliminary examination for the limited purpose of impeachment. However, since it was sworn testimony under oath it was admissible as substantive evidence. MRE 801(d)(1)(A). Thus, a factual dispute existed regarding whether defendant stabbed the victim in the back as the victim was leaving the house. Where evidence conflicts, the district court must bind the defendant over to allow the trier of fact to resolve the factual conflict. *Goecke*, *supra* at 469-470. Moreover, the parties stipulated that the victim suffered twenty-six stab wounds. Given the extensive injuries to the victim, and the initial testimony that defendant stabbed the victim in the back, the district court should have bound defendant over as charged. Accordingly, the trial court did not err in reinstating the original charge of first degree murder.

Defendant also contends that the trial court should not have granted a stay of the proceedings while it decided whether to grant the delayed application for leave to appeal the bindover. Defendant failed to raise this issue in his statement of questions presented, as required by MCR 7.212(C)(5). *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). We decline to reach this unpreserved issue.

Next, defendant argues that the trial court abused its discretion by failing to grant defense counsel's motion to withdraw and failing to appoint substitute counsel. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). Counsel moved to withdraw because defendant had filed grievances against him and had allegedly threatened him. However, defendant denied threatening counsel, indicated he did not wish to represent himself, and claimed he would allow counsel to try the case. The trial court, noting the experience and competence of counsel, denied the motion to withdraw. Defendant was not denied the effective assistance of counsel by the court's failure to appoint substitute counsel, as good cause for substitution was not shown. A defendant may not threaten appointed counsel in order to obtain substitute counsel. See, e.g, *People v Staffney*, 187 Mich App 660, 664, 667; 468 NW2d 238 (1991); *People v Meyers (On Remand)*, 124 Mich App 148, 165; 335 NW2d 189 (1983); *People v Harlan*, 129 Mich App 769, 778; 344 NW2d 300 (1983). In this case, defendant even denied threatening counsel. Defendant has not demonstrated that the trial court abused its discretion.

Defendant also claims that the prosecutor improperly impeached a witness' testimony with extrinsic evidence on a collateral matter. MRE 613(a); *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). A matter is collateral where it is unrelated to any issue in the case. *Legalo v Allied Corp* (on Remand), 233 Mich App 514, 518; 592 NW2d 786 (1999). Testimony contradicting defendant's girlfriend's account of the stabbing incident was certainly not a collateral matter. Further, although testimony contradicting defendant's girlfriend's account of a

telephone call she made to a friend shortly before the stabbing was collateral, defendant has not shown how the admission of that testimony affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); see also *People v Reed*, 172 Mich App 182, 187-188; 431 NW2d 431 (1988) (harmless error).

Defendant raises a number of issues in propria persona. After reviewing each claim of error, we find them to be without merit. The prosecutor presented testimony that defendant, while chasing away the victim's fiancé, stabbed the victim twenty-six times in the back as the victim was leaving the house. A rational trier of fact could have concluded beyond a reasonable doubt that defendant intentionally and with premeditation killed the victim. *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998); *Kelly*, *supra* at 642. Thus, the trial court did not err by denying defendant's motion for a directed verdict on the murder charge.

Further, defendant was not twice placed in jeopardy for the same offense when he was tried after the charges against him were initially dismissed without prejudice. Jeopardy had not attached when the charges were dismissed because the jury was not yet selected and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). Additionally, the prosecutor did not violate the 180-day rule since the rule does not apply to pretrial detainees. MCL 780.131; MSA 28.969(1); MCR 6.004(D); *People v Chambers*, 439 Mich 111, 115-116; 479 NW2d 346 (1992).

Additionally, the trial court did not err by failing to instruct the jury on involuntary manslaughter. The evidence did not support an instruction on this cognate lesser offense because involuntary manslaughter involves an unintentional killing. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996); *People v Booker (After Remand)*, 208 Mich App 163, 171; 527 NW2d 42 (1994). Here, the evidence showed that defendant stabbed the victim multiple times, causing such a great loss of blood that the medical examiner was not able to obtain a blood sample from the victim's body. Moreover, defendant continued to stab the victim, even after the victim's fiancé attempted to intervene, and only stopped when the police arrived. An instruction on a cognate lesser offense need only be given where the evidence would support a conviction of the lesser offense. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996).

Moreover, defendant was not denied the effective assistance of counsel. In the absence of a *Ginther*[1] hearing, review by this Court is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to establish ineffective assistance of counsel, defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant argues that his counsel was ineffective for not effectively challenging the reinstatement of the first degree murder charges. However, the content of counsel's argument opposing reinstatement of the murder charge, as well as the decision whether to file an

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

interlocutory appeal, is a matter of sound trial strategy that we decline to second-guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, there is no evidence on the record of counsel's ineffectiveness. Thus, we conclude that defendant has not overcome the presumption that his trial counsel's actions were a matter of trial strategy and consequently we hold that defendant's claim of ineffective assistance of counsel is without merit.

Finally, defendant was not denied due process by the prosecutor's failure to comply with the requirements of MCR 6.110(F). This court rule, by its plain terms, applies to a defendant who has been discharged after the preliminary examination based on a finding of lack of probable cause. On the contrary, defendant in this case was bound over on first-degree murder after his first preliminary examination.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper