STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24 2001
v	No. 224025 Kent Circuit Court
ELWYNE MARTIN, Defendant-Appellant.	LC No. 99-002687-FC

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

PER CURIAM.

Following a bench 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). He was sentenced to 8 to 20 years' imprisonment for second-degree murder, and the mandatory two-year consecutive term of imprisonment for felony-firearm. He appeals as of right. We affirm.

The following facts are essentially undisputed. On December 14, 1999, defendant and some friends, including the victim, were out drinking at several bars and subsequently went to defendant's house, where they continued drinking alcohol and using cocaine. When the party ended, at approximately noon the following day, defendant asked the victim to leave his house. An argument ensued because the victim did not want to leave. Defendant testified that he walked outside with the victim and, at one point, defendant took off his glasses in expectation of a fight. Apparently, the victim waved a "knife" in the direction of defendant, but after exchanging a few words, defendant backed up and went inside his house. However, instead of leaving, the victim returned to defendant's house and kicked the side door. Defendant retrieved his rifle and ran back outside. At this point the victim was already inside of his car. Defendant immediately fired two shots as he exited the side door of his home. Thereafter, the victim began to back his car out of the driveway but defendant followed the car to the street and fired at the car one more time.[1]

[1] There were four actual shots attempted but on the third shot the rifle jammed and misfired. Thus, there were two shots from the door, a misfire, and a final shot as the victim drove way. Four empty shell casings were found in front of defendant's home.

A few blocks past defendant's house, the victim's car crashed into a house. The victim was found slumped over the steering wheel and dead of a gunshot wound to the chest. When the police began to investigate, they found a patch of shattered safety glass on the road near defendant's home. Within a few hours of the incident, the police questioned defendant on his porch to determine if he knew anything about what had happened. The defendant spoke freely to the police. When the defendant began to make incriminating statements, the police informed him of his Miranda rights.[2] Later, at the police station, defendant repeated his earlier story. However, these statements were made before defendant was informed that the victim had died.

Defendant first contests the sufficiency of the evidence supporting his second-degree murder conviction. A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo and in the light most favorable to the prosecution to determine if the trial court was justified in finding that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). "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). Defendant concedes that he caused the death of the victim by shooting him, but argues that he was justified under either a theory of self-defense or imperfect self-defense and that his actions lacked the element of malice.

Defendant asserts that his actions were justified under the theory of self-defense. A homicide is justifiable under a self-defense theory "if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Defendant testified that he feared the victim was reaching for a gun when he fired the first two shots.[3] However, the trial court concluded that defendant fired his weapon so quickly after going outside, that he probably did not have an opportunity to form an opinion regarding the victim's possession of a gun. Defendant's own testimony established that he fired the first shots within a few seconds of walking outside. Moreover, even if the victim had a gun, defendant testified that his purpose for shooting was to scare the victim and prevent him from returning. To the extent that defendant was acting in a preventative capacity, this logically refutes a conclusion that a threat of harm was imminent. Additionally, the fact that the victim was in the process of leaving when defendant fired the last shot clearly indicates that there was no immediate threat of harm to defendant requiring self-defense. Thus, there is sufficient evidence to support the trial court's conclusion that self-defense was inapplicable in this case.

Defendant further argues that he was entitled to have the judge consider the mitigating effect of imperfect self-defense. Although our Supreme Court has yet to sanction this defense, this Court has ruled that "[i]mperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter." *People v Kemp*, 202 Mich App 318, 323; 508 NW2d

---

[2] *Miranda v Arizona*, 384 US 436, 467, 478-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] It is noteworthy that defendant never actually saw the victim with a gun and a gun was never found on the victim or in the victim's vehicle.

184 (1993). The Court in *Kemp* opined that imperfect self-defense is applicable where the defendant would have been able to rely on a self-defense theory had he or she not been the initial aggressor. *Id.* In the instant matter, the trial court noted that defendant was the aggressor to the extent that he asked the victim to leave his house. However, the trial court also found that defendant's actions were unreasonable and not responsive to a threat of imminent harm. Thus, since defendant was not entitled to benefit from the theory of self-defense, for reasons other than his potential status as the aggressor, the trial court's refusal to apply the doctrine of imperfect self-defense is also supported by the evidence.

Defendant further claims that he did not posses the necessary element of "malice" when he fired his weapon at the victim's vehicle. Our Supreme Court defines "malice" as either an intent to kill or cause great bodily harm, or merely an "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." *Goecke, supra* at 464. Defendant contends that his use of drugs, voluntary intoxication, sleep deprivation, and fear of harm prevented him from forming a malicious intent.

Goecke clearly states that voluntary intoxication is not an available defense to second-degree murder and that only the unusual case would require the court to confront the issue of a defendant's subjective awareness of the dangerousness of his conduct. *Id*. at 464-465. We find that this is not such an unusual case. Shortly after the incident, defendant told the police in the first interview that he was not intoxicated. The officers described defendant as lucid during the second interview. Moreover, the trial court emphasized that defendant fired four shots within close range of the victim's vehicle, and three shots struck the occupant's area of the vehicle. The trial court stated in its decision that "you cannot fire a .22 at relatively close range at a car without being, I think, in willful disregard of the consequences of what may happen." Additionally, defendant testified that he intended to scare the victim. The trial court placed some importance on the fact that defendant fired the last shot as the victim's car was pulling away. Accordingly, we believe that there was sufficient evidence supporting the trial court's finding of malice.

Defendant next argues that his trial counsel was ineffective for failing to argue that defendant's intoxication and sleep and food deprivation prevented him from making an effective waiver of his rights in the second police interview.[4] Since defendant did not request a *Ginther*[5] hearing, this Court's review is limited to mistakes apparent on the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000). Defendant must show that his counsel's "representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that counsel's conduct was reasonable. *Id.*

---

[4] In footnote 21 of appellate counsel's brief, the argument of ineffective assistance of counsel was limited to the failure to object to the admission of the statements made at the police station.

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

Within hours of the incident, defendant was questioned by police and made incriminating statements that were ultimately admitted into evidence. Sometime during the course of the first interview, the police informed defendant of his rights but failed to inform him that they were investigating a homicide or that the victim was dead. At trial, defense counsel moved to exclude the statements made to police, at both interviews, on the grounds that defendant's waiver of his rights was ineffective because the investigating officers failed to inform defendant of the victim's death. The trial court denied this motion and defense counsel failed to make the additional argument that defendant's intoxication and lack of food and sleep also influenced his ability to make an informed waiver.

We do not believe that a defense counsel's failure to argue every possible exclusionary ground is indication that he failed to provide a reasonable defense. See *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994). "Defense counsel is not required to raise a meritless objection." *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Furthermore, even if defense counsel's performance was ineffective, we would have to find that, but for defense counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different. *Toma, supra* at 302-303.

The trial court correctly ruled that defendant's statements made during the first interview on his porch, were admissible, even absent the Miranda warnings that were given, because it was not a custodial interrogation. *People v Peerenboom*, 224 Mich App 195, 197-198; 568 NW2d 153 (1997). Therefore, the information obtained during the first interview was properly admitted into evidence. However, since defendant signed a waiver of his rights, and the records do not indicate that the waiver was involuntary, unknowing, or that the police engaged in coercive tactics, his statements made during the second interview with police were also properly admitted into evidence. See *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992).[6] Defendant even admitted that he told police he was not intoxicated during the interviews and the police officers testified that the defendant appeared to be quite lucid. In fact, defendant had enough awareness of his rights to request a lawyer during the second interview. When defendant made his request for an attorney, the police immediately ended the interview.

More importantly, the facts elicited during the first and second interviews were essentially the same. Thus, while the trial court may have cited to statements from the second interview in its decision, it could have reached the same conclusion with information from the first interview and defendant's own testimony. We conclude that defendant was not deprived of the effective assistance of counsel because there is no indication of prejudice. *Toma, supra* at 302-303.

---

[6] There is no requirement to read Miranda rights every time a defendant is questioned. *Littlejohn, supra* at 223. The second interview took place at police headquarters. Before the interrogation began, the officer advised defendant as follows: "I advised you of your rights earlier. Ah, I don't think I have to remind you. You know what they are. You're a pretty sharp guy so." See *People v Godboldo*, 158 Mich App 603; 405 NW2d 114 (1986). The record does not reflect that defendant misunderstood these statements or that he was forced to answer questions.

Finally, defendant contends that his sentence for second-degree murder was an abuse of discretion, as it was based on inaccurate information and was disproportionate to the offense. Defendant purports that the evidence was "woefully insufficient" to support a finding that he acted with the requisite knowledge that death or great bodily harm would result from his actions. Defendant further asserts that his sentence was disproportionate due to his limited criminal history and the fact he was acting in self-defense. We review a trial court's sentence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999)[7].

Defendant claims that the trial court erred by denying his motion to change the scoring of offense variable 3 from 25 points to 10 points.[8] A claim of error involving the application of the judicial sentencing guidelines does not provide a basis for relief on appeal unless: "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998) (quoting *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997).

As discussed previously, there was sufficient evidence to support a finding that defendant was guilty of second-degree murder. The malice requirement of second-degree murder is consistent with the knowledge requirement of offense variable 3. Offense variable 3 provides that the defendant have knowledge that death or great bodily harm are the probable results of his actions. Moreover, any error in the scoring of the offense variables cannot constitute reversal unless the sentence is also disproportionate. *Raby, supra* at 498.

A sentence is an abuse of discretion if it "violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Cain, supra* at 130 (quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990)). A sentence that is within the sentencing guidelines recommendation is presumptively proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997).

---

[7] Our Supreme Court's sentencing guidelines apply to offenses committed before January 1, 1999, MCL 769.34(1); MSA 28.1097(3.4)(1), *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000), while the statutory sentencing guidelines apply to offenses committed on or after January 1, 1999, MCL 769.34(2); MSA 28.1097(3.4)(2), *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). Since the offense in the instant matter occurred on December 15, 1998, the judicial sentencing guidelines apply.

[8] Offense variable 3 provides in pertinent part as follows:

> 25 Unpremeditated intent to kill; or intent to do great bodily harm; or creation of a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result[.]
>
> 10 Intent to injure; or homicide committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time has elapsed for the offender to calm; or gross negligence amounting to an unreasonable disregard for life[.]

In the instant matter, defendant's sentence is presumptively proportionate as he received the minimum sentence recommended in the guidelines.[9] Moreover, while defendant may not have an extensive criminal history, his actions in this case resulted in the death of an individual. Consequently, we do not believe that the presumption of proportionality has been rebutted, or that the trial court abused its discretion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper

[9] We note that even if the scoring of Offense Variable three had been 10 points, defendant's actual sentence would still have been entitled to a presumption of proportionality.