STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2002
v	No. 231962 Kent Circuit Court
DARYL WESLEY GARRISON, Defendant-Appellant.	LC No. 00-03613-FH

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317. He was sentenced to twenty-five to fifty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first argues that he was deprived of effective assistance of counsel when his trial counsel failed to request instructions on accident, involuntary manslaughter, and imperfect self-defense. We disagree. Because defendant failed to move for a new trial or a *Ginther*[1] hearing, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-

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

445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

Defendant claims his trial counsel was ineffective in failing to request an accident instruction. Jury instructions must not omit material issues, defenses, and theories if the evidence supports them. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Here, defendant's trial counsel vigorously pursued a legitimate trial strategy of self-defense, which the evidence supported and on which the trial court instructed the jury. On the other hand, apart from the possibility that defendant's trial counsel did not want to dilute the strength of this defense by arguing inconsistent theories, the evidence simply did not support an accident instruction. Defendant suggests that because the victim fell on a knife that defendant drew while he and the victim were fighting at close quarters, the evidence supported a theory of accident. The term "accident" has been judicially defined as "some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops; something happening by chance; something unforeseen, unexpected, unusual, extraordinary or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations . . . ." *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995) (citations omitted). By this definition, it can hardly be said that it is "unexpected" or "something unforeseen" or "out of the range of ordinary calculations," let alone "phenomenal," when the result of two people fighting at close range while one of them holds a knife is for one of them to be cut by the knife. See *id.* The evidence simply did not support an instruction for accident, and it was not ineffective assistance for counsel not to request this instruction, as counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Similarly, the evidence did not support the theory that defendant was guilty of involuntary manslaughter. An instruction on a lesser-included offense is appropriate only if there is evidence that would support a conviction of the lesser offense. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). See also *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). As defined by our Supreme Court in *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974):

> "'Involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.'"

An involuntary manslaughter instruction would not have been appropriate in this case because, again, the evidence presented at trial did not support such an instruction. Rather, the evidence established that defendant pulled a knife on the victim during a fight at close quarters. Thus, this cannot be described as an act that is not "naturally tending to cause death or great bodily harm," or that it is lawful in itself. *Id.* Accordingly, the evidence in this case does not support a conviction of involuntary manslaughter and trial counsel was not ineffective in failing to request such an instruction.

Although the trial court instructed the jury on self-defense, defendant argues that his trial counsel should have requested an instruction on imperfect self-defense as well. Michigan law, however, does not apply the concept of imperfect self-defense to circumstances where, as here,

the defendant was not the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Thus, such an instruction would have been improper, and it was not ineffective for counsel not to advocate this meritless position. *Snider*, *supra*.

Defendant next argues that the trial court erred in failing to sua sponte instruct on the three theories – accident, involuntary manslaughter, and imperfect self-defense – discussed *supra*. However, a trial court is not required to instruct the jury on lesser-included offenses unless requested. *Moore*, *supra*. In this case, defendant failed to request the instructions he now asserts should have been given sua sponte by the trial court. Indeed, not only did defendant fail to request the instructions or object to the instructions as given, he expressed satisfaction with the jury instructions, thereby waiving the issue on appeal as his approval extinguished any error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Because defendant waived the issue, "there is no 'error' to review." *Id.* at 219.

Finally, defendant argues that the trial court erred by admitting, over his objections, gruesome photographs of the victim after his death, which showed not only his knife wounds, but also a large incision made in his chest at the hospital in an attempt to revive him. Specifically, defendant argues that the probative value of these photographs was substantially outweighed by their prejudicial effect, and therefore, they ought to have been excluded under MRE 403. We disagree. The trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Contrary to defendant's argument, the probative value of the photographs strongly outweighed any prejudicial effect as the forensic pathology expert testified that the appearance of the wounds was crucial to a determination of whether the wounds could have been incurred by the victim falling on the knife as opposed to being stabbed, which was the central issue in dispute in this case. Because the probative value of the photographs outweighed any prejudicial effect and because even graphic and gruesome photographs are not to be excluded under MRE 403 when instructive to show material facts or conditions, such as the way an injury was received or whether it was inflicted intentionally, the trial court did abuse its discretion in admitting the photographs into evidence. See *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995).

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray