STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2002
v	No. 231696 Allegan Circuit Court
JACOB RUSSELL MARTIN, Defendant-Appellant.	LC No. 00-011589-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was convicted after jury trial of second-degree murder, MCL 750.317, and was sentenced as an habitual offender, MCL 769.10, to a prison term of not less than 39 years and not more than 60 years. Defendant appeals as of right. We affirm defendant's conviction but remand for resentencing.

Defendant first argues that the trial court erred by not suppressing his statements to the police as involuntary products of police promises and intimidation. We disagree.

When considering a motion to suppress a statement, the trial court must examine the totality of the circumstances to determine whether defendant's statement was voluntary, and whether defendant made a voluntary, knowing, and intelligent waiver of his constitutional rights to silence and to counsel. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Cavanagh, J.); 551 NW2d 355 (1996); *People v Snider*, 239 Mich App 393, 416; 608 NW2d 502 (2000). This Court must review the entire record de novo, but factual determinations of the trial court will not be set aside unless clearly erroneous. MCR 2.613(C); *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000); *Cheatham*, *supra* at 30. A statement is voluntary if, under the totality of the circumstances, it is "the product of an essentially free and unconstrained choice by its maker," rather than one where the defendant's "will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). A court must decide whether a statement is voluntary by reviewing all of the circumstances surrounding its making, with no single factor being determinative. *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000); *Cipriano*, *supra.*

* Circuit judge, sitting on the Court of Appeals by assignment.

In the present case, defendant gave two statements to the police. The first was given at his attorney's office and in the presence of his attorney, after waiver of his *Miranda*[1] rights. The second statement was given about a week later when defendant voluntarily appeared for a polygraph test with his attorney, again after *Miranda* warnings were given. The record indicates defendant was advised of his *Miranda* rights at least three times by the police and had counsel present during one interview and available for consultation at the polygraph test. Defendant chose not to testify at the suppression hearing, and police officers testified without contradiction that defendant had been read his *Miranda* rights, acknowledged he understood his rights, and had counsel present or available. Based on this evidence, we find the trial court did not clearly err by finding that defendant made a voluntary, knowing, and intelligent waiver of his rights. *Daoud, supra* at 629.

Further, de novo review of the record convinces us that defendant's statements were voluntary and the trial court correctly denied defendant's motion to suppress. *Sexton (After Remand), supra* at 752. There was no evidence that any promises by police officers overcame the will of defendant so that his statement was not his own free and unconstrained choice. *Cipriano, supra* at 333-334. Likewise, there was no evidence that the presence of three police officers critically impaired defendant's capacity for self-determination. *Id.* Thus, the totality of the circumstances, including lack of coercion, waiver of *Miranda* rights, and presence of an attorney, establishes that defendant's statements were "the product of an essentially free and unconstrained choice by [their] maker," and nothing in the record indicates that defendant's "will has been overborne and his capacity for self-determination critically impaired." *Id.* The trial court correctly denied defendant's motion to suppress.

We consider next defendant's claim that the trial court abused its discretion by not appointing substitute counsel for defendant. An indigent defendant's right to the appointment of a lawyer at public expense does not include the right to choose the lawyer the court will appoint. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). However, a defendant may become entitled to have substitute counsel appointed upon a showing of adequate cause. *Id.* Where a defendant demonstrates "good cause," and the judicial process will not be unreasonably disrupted, an indigent defendant may obtain substitute appointed counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A trial court's decision on a motion to appoint substitute counsel is reviewed for an abuse of discretion. *Traylor, supra* at 462; *Mack, supra* at 14.

Good cause to appoint substitute counsel exists when a defendant's appointed counsel "is not adequate or diligent or . . . is disinterested." *Ginther, supra* at 442. Good cause exists when there is a danger that defense counsel may not fulfill the requirement of the Sixth Amendment to put the prosecutor's case to "meaningful adversarial testing," *United States v Cronic*, 466 US 648, 656; 104 S Ct 2039; 80 L Ed 2d 657 (1984), or a danger that the defendant may not receive a fair trial, *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Good cause also may occur when a legitimate difference of opinion develops between defendant and appointed counsel concerning a fundamental trial tactic. *Traylor, supra* at 462; *People v*

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Jones, 168 Mich App 191, 194; 423 NW2d 614 (1988). A fundamental trial tactic would include "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). When defendant and appointed counsel have a bona fide dispute over a substantial defense, substitute counsel may also be justified. *Ginther*, *supra*, 442; *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972).

In the present case, defendant's allegations that counsel did not see things defendant's way did not demonstrate good cause. *People v Meyers (On Remand)*, 124 Mich App 148, 165-166; 335 NW2d 189 (1983). Also, allegations that counsel did not wish to pursue unspecified motions or pursue a risky trial strategy of calling an accomplice witness, which counsel indicated a willingness to pursue if defendant insisted, did not demonstrate good cause because matters of general legal expertise and strategy fall within the sphere of the professional judgment of counsel. See, e.g., *Traylor*, *supra*, 463 (filing frivolous motions); *Jones*, *supra*, 168 Mich App at 195 (questioning witnesses); *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979) (questioning witnesses and juror voir dire). The record established that counsel conveyed the prosecutor's plea offer to defendant but was ready, willing, and able to try the case if that was defendant's choice. Similarly, counsel's candor concerning the merits of the case is not grounds for substitution of counsel. *People v Shuey*, 63 Mich App 666, 672; 234 NW2d 754 (1975); *People v Russell*, 47 Mich App 320; 209 NW2d 476 (1973). Therefore, the trial court did not abuse its discretion by declining to appoint substitute counsel for defendant. *Traylor*, *supra*, 462.

Next, defendant argues that the trial court erred by denying his request to instruct the jury on the offense of voluntary manslaughter. Again, we disagree.

The trial court is required to instruct the jury on the law applicable to the case. MCL 768.29; *People v Cornell*, 466 Mich 335, 341; 646 NW2d 127 (2002). We review alleged instructional error de novo. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

This issue is controlled by MCL 768.32(1), which permits jury consideration only of necessarily included lesser offenses, not cognate lesser offenses. *Cornell*, *supra* at 354-355; *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Voluntary manslaughter is not a necessarily lesser included offense of murder. *People v Pouncey*, 437 Mich 382, 387-388; 471 NW2d 346 (1991); *People v Van Wyck*, 402 Mich 266, 268-269; 262 NW2d 638 (1978). Because our Supreme Court applied its decision in *Cornell*, *supra*, to cases "pending on appeal in which the issue has been raised and preserved," *id*. at 367, the trial court did not err by refusing to instruct the jury on the cognate lesser offense of voluntary manslaughter.

Defendant also argues that although trial counsel did not object, manifest injustice resulted when the trial court instructed the jury it "may infer that the defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death," and also that the jury "may infer that the defendant intended the usual results that follow from the use of a dangerous weapon." Defendant contends the instructions unconstitutionally shifted the burden of proof because the trial court did not instruct the jury that it need not make such an inference, nor did it instruct the jury that other possible inferences exist from the use of a dangerous weapon, such as self-defense, protection of others, protection of property or accident. We disagree.

Where an alleged instructional error has not been preserved, it is forfeited and review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The test requires (1) there must be an error; (2) the error must be plain (i.e., clear or obvious); and (3) the error affected substantial rights (i.e., there must be a showing of prejudice or that the error was outcome determinative). *Id*. Even where the three-part test is satisfied, reversal is warranted "only when the plain, forfeited error result[s] in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Michigan has long recognized that the factfinder may infer malice from the use of a dangerous weapon. *People v Martin*, 392 Mich 553, 561; 221 NW2d 336 (1974); *People v Garcia*, 36 Mich App 141, 142; 193 NW2d 187 (1971). Here, the trial court's instructions permitted, but did not require, an inference of malice if the jury found that defendant used a dangerous weapon in a way likely to cause death. Thus, the trial court's instructions did not violate defendant's due process right to require proof beyond a reasonable doubt of every element of the charged offense because the instructions would not have created a conclusive presumption in the mind of a reasonable juror; nor did the trial court's instructions shift the burden to defendant to produce contrary evidence. *Sandstrom v Montana*, 442 US 510, 514, 522-524; 99 S Ct 2450; 61 L Ed 2d 39 (1979).

The cases cited by defendant do not hold to the contrary. None of the errors found in *Sandstrom, supra*; *People v Richardson*, 409 Mich 126; 293 NW2d 332 (1980); *People v Wright*, 408 Mich 1; 289 NW2d 1 (1980); and *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974); were present in the case at bar. Further, although a proper instruction on the presumption of innocence and the burden of proof, as given here, will not vitiate a burden-shifting error, *Sandstrom, supra,* 518 n 7, the trial court instructed the jury that it must review all of the evidence when deciding defendant's state of mind and that the jury was the sole factfinder, which encompassed determining the credibility of all witness, including defendant. Thus, the trial court's instructions, when read as a whole, fairly presented the issues to be tried and sufficiently protect the defendant's rights. *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985); *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

Defendant's argument that the trial court should have balanced its instructions by including comments that other possible inferences may arise from the use of a dangerous weapon, such as self-defense, protection of others, protection of property or accident, is without merit. The trial court's duty to instruct the jury depends on the evidence, *Riddle, supra* at 124, and thus no error occurred here because there simply was no evidence at trial that even remotely suggested accident or justifiable use of force, *Wess, supra* at 243. Defendant's theory and testimony was that he did not commit the offense; not that his actions were justifiable.

In summary, plain error did not affect defendant's substantial rights because it was not outcome determinative, nor did the alleged erroneous instructions result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763, 774; *Snider, supra* at 420.

Finally, we agree with defendant that the statutory sentencing guidelines were incorrectly scored in this case. Defendant raises this on appeal as both a sentencing issue and a matter of ineffective assistance of counsel. We note that defendant failed to preserve his claim that the sentencing guidelines were incorrectly scored by not raising the issue at sentencing. MCR 6.429(C); MCL 769.34(10); MCL 771.14(6); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Alleged sentencing errors that have been forfeited are reviewed for plain error affecting defendant's substantial rights. *People v Kimble*, 252 Mich App 269, 277-278; 651 NW2d 798 (2002); *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

The legislative sentence guidelines apply to the present case because the instant offense was committed on or after January 1, 1999. MCL 769.34(1), (2); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). A sentence is invalid, and therefore subject to correction, when it is based on inaccurate information. MCR 6.429(A); *People v Miles*, 454 Mich 90, 96-98; 559 NW2d 299 (1997); *People v Harris*, 224 Mich App 597, 599-600; 569 NW2d 525 (1997).

It is undisputed in this case that offense variable (OV) 3 was incorrectly scored at 100 points because the sentencing offense was second-degree murder and the statute governing the scoring of that variable instructs to "[s]core 100 points if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b). The scoring error resulted in a recommended guidelines minimum sentence range of 225 to 468 months or life. MCL 777.61. Had OV 3 been correctly scored at zero, the appropriate guidelines range would have been 180 to 375 months or life. Neither party alerted the trial court to the guidelines scoring error. The prosecutor recommended a life sentence, defense counsel recommended a sentence in the middle of the guidelines range (a term of years), and the trial court imposed a minimum prison term at the top of the putative guidelines range of 468 months (39 years). The sentence imposed in this case was therefore outside the appropriate recommended minimum sentence range of the properly scored guidelines. Because the trial court believed its sentence was within the appropriate guidelines sentence range, it failed to find and state on the record a substantial and compelling reason for departing from the correct range. The trial court's error resulted in plain error affecting defendant's substantial rights. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000). Therefore, remand for resentencing is required. MCL 769.34(11); *Hegwood*, *supra* at 440; *Babcock*, *supra* at 74, 80. On remand, the trial court may review again what sentence is appropriate in this case, and may impose a sentence within the appropriate guidelines range or depart from that range, provided it finds and states on the record a substantial and compelling reason to depart. MCL 769.34(3); *Kimble*, *supra* at 280; *Babcock*, *supra* at 80.

Defendant's conviction is affirmed but the case is remanded for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof