STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2004
v	No. 244902 Wayne Circuit Court
GEORGE CANTAL FERGUSON, Defendant-Appellant.	LC No. 01-013378

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of twelve to twenty years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right arguing that the trial court erred when it instructed the jury, denied defendant's motion to suppress his statement to police, admitted a police officer's opinion as evidence, and finally when it sentenced defendant using the statutory sentencing guidelines. Defendant also claims he was denied the effective assistance of counsel at trial. After reviewing the record, we find error in defendant's sentencing, but the remainder of defendant's assignments of error do not warrant appellate relief. We affirm defendant's convictions, but remand for resentencing.

I

Defendant argues that the trial court erred in handling the jury's request for supplemental instructions on the distinction between second-degree murder and manslaughter. Because defendant failed to object to the trial court's instructions at trial, this issue is not preserved. *People v Alter*, 255 Mich App 194, 204; 659 NW2d 667 (2003). We therefore review the issue for plain error affecting defendant's substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

At the close of the proofs, the trial court instructed the jury on the elements of first- and second-degree murder as well as manslaughter. Neither party expressed any dissatisfaction with the court's instructions. The following day, the jurors requested "the qualifications for First, Second, and Voluntary Manslaughter, and gun charge." The trial court re-read its prior instructions on the elements of these offenses, but did not include the instructions explaining how a disturbed emotional state could cause a defendant to act on impulse rather than judgment,

and thereby reduce a murder to voluntary manslaughter. The jurors also requested "a complete copy of the instructions," but the trial court replied that it did not have the capacity to fulfill their request and instructed the jurors to rely on their collective memory. Both attorneys expressed satisfaction with the trial court's response.

Five hours later, the jury again requested a reading of the instructions on first-degree murder, second-degree murder, and voluntary manslaughter. The trial court again read the elements, omitting the explanation of how a disturbed emotional state could reduce murder to voluntary manslaughter. Both parties indicated the instructions were satisfactory. Half an hour later, the jurors sent the trial court another note, stating, "[c]ould you explain exactly the difference between second degree murder and voluntary manslaughter." The trial court replied that it would "read both of them to you and tell you that you need to listen when I say what is the third issue in both of them. That's the area of the difference." After the court finished, the attorneys acknowledged that the trial court "read it as we agreed." The next day, the jury reached a verdict of second-degree murder.

Defendant now argues that the trial court's supplemental instructions were inadequate to resolve the jurors' confusion over the distinction between the two offenses. He asserts that the trial court should have read CJI2d 16.9, that explains the difference between second-degree murder and voluntary manslaughter, and not just CJI2d 16.8, that merely sets forth the elements.

When the jurors made their third request, they specifically asked for an explanation of the distinction between second-degree murder and manslaughter. The trial court's reiteration of the elements, without any discussion of heat of passion, failed to inform the jurors that where a defendant acts under the influence of adequate and reasonable provocation, the offense is voluntary manslaughter and not murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991); *People v Hopson*, 178 Mich App 406, 411; 444 NW2d 167 (1989). The supplemental instruction thus omitted the information the jurors needed to understand the difference between the offenses.

Because we review jury instructions as a whole to determine if the trial court made an error requiring reversal, although the supplemental instructions were not responsive to the jury's request and potentially misleading, on the whole the error did not affect defendant's substantial rights. *Carines, supra* at 763; *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Furthermore, the evidence here did not support a verdict of manslaughter. The only arguable basis for provocation was defendant's statement that the victim, Rynel Murphy, reached for his gun during an argument over stolen car radios, and defendant "beat him to the draw." If true, this would only establish that defendant shot Murphy in self-defense, not in the heat of passion. *Pouncey, supra* at 388. Furthermore, defendant's statement, "I knew once I shot him once, I had to kill him," is inconsistent with any suggestion that defendant acted impulsively without exercise of judgment. The jurors' rejection of self-defense as justification for this offense shows they did not believe defendant shot Murphy in reaction to Murphy's threatening conduct. Accordingly, the trial court's failure to adequately respond to the jury's request did not affect defendant's substantial rights.

II

Defendant contends that the trial court erred in denying his motion to suppress his custodial statement to Officers Childs and Harris. We disagree.

The Due Process Clause of the Fourteenth Amendment prohibits use of an involuntary statement coerced by police conduct. US Const, Am XIV; *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). The question of whether a statement was made voluntarily is generally determined by an examination of police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). When this Court reviews a trial court's determination of voluntariness, it is required to examine the entire record and make an independent determination of the issue as a question of law. *Wells, supra* at 386. However, this Court will affirm the trial court's decision unless it is left with a definite and firm conviction that the trial court erred. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). If the question of voluntariness rests on a disputed factual question that turns on the credibility of witnesses or the weight of the evidence, this Court will defer to the trial court, given its superior opportunity to evaluate these matters. *Id.*

Defendant testified at a *Walker*[1] hearing that Officers Harris and Childs kept him handcuffed to a table throughout the interrogation, and denied him food, drink, and bathroom breaks. He claimed that Officer Childs beat him in the ribs and threatened him with more beatings until he signed the inculpatory statement. Defendant said he did not know what he was signing, but signed it to stop the beatings. Defense counsel argued that defendant's medical records corroborated defendant's account of physical abuse. Defendant also presented evidence that he was substantially smaller than the officers and felt intimidated by the officers' size and strength. He contended that he had no prior experience with police interrogation, and falsely incriminated himself because he feared more beatings.

However, Officers Childs and Harris denied abusing, threatening or shackling defendant. According to the officers, defendant never indicated he wanted an attorney, or claimed he was hungry or sleepy. Defendant did not indicate that he was under the influence of drugs or alcohol, and did not appear to be under the influence of an intoxicating substance. The officers stated they gave defendant soda to drink. They did not recall whether they brought him food, but testified that they always provide food when a suspect requests it, that defendant did not complain of hunger, and that he had been eating spaghetti when they arrested him. He was allowed bathroom breaks whenever he asked and slept at some point during the thirteen-hour session. According to the officers, defendant ultimately gave an incriminating statement after previously denying guilt because they confronted him with a failed polygraph test, inconsistencies between his previous statements, and inconsistencies between his previous statements and physical evidence. They acknowledged that defendant was tearful and nervous, but coherent.

Although, standing on its own, defendant's account of the interrogation would support a finding of involuntariness. See *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). However, the trial court found defendant not believable. The court also observed that

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

defendant's medical records showed only that he complained of pain, not that he exhibited any sign of injury. The trial court's assessment of the witnesses' credibility, and its weighing of the evidence does not leave us with a definite and firm conviction that the motion was erroneously denied. *Sexton, supra* at 752. Accordingly, we reject this claim of error.

III

Defendant claims that the trial court erred in permitting Officer Childs to offer his opinion of what happened in the Explorer when Murphy was shot. Defendant preserved this issue with an appropriate objection at trial. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *Aldrich, supra* at 113. An error in the admission or exclusion of evidence is not ground for reversal unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. Under this rule, reversal is required only if the error was prejudicial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The defendant must show that it is more probable than not that the alleged error affected the outcome of the trial, in light of the weight of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 427-428; 635 NW2d 687 (2001).

Defendant objected to Officer Child's opinion testimony at trial, arguing that Officer Childs was presenting a scenario that none of the expert witnesses had established. The prosecutor responded that the other experts had studied only the evidence in their respective fields, and none of them had studied all the evidence. Defendant argues now that Officer Childs' opinion was inadmissible under MRE 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

To a large extent, Officer Childs' testimony met the requirements of MRE 701. His opinion that the physical evidence was more consistent with a shooting from the front passenger seat than from the rear seat helped explain why his investigation team focused on defendant, and explained his interrogation method of confronting defendant with inculpatory evidence. However, contrary to the trial court's admonition against using facts not in evidence, Officer Childs made inferences that the experts did not make and that are beyond a layperson's knowledge. Officer Childs opined that Murphy's abdominal wound caused his body to bend, which explained where Murphy's head was when the head wound was inflicted. Medical Examiner Sawait Kanluen, who testified as an expert for the prosecution, acknowledged that he could not determine the position of Murphy's head at the time of the shooting. We find this portion of Officer Childs' testimony inadmissible under MRE 701.

Nonetheless, we conclude the error was harmless. It is not probable that this error affected the outcome of the case. *Whittaker, supra* at 427-428. On recross-examination, Officer

Childs conceded that he had no training in pathology, that he was not present during the shooting, and that he did not "exactly" know what happened in the vehicle. Moreover, Officer Childs' discussion of the physical evidence and how it supported his opinion added little to the physical evidence that clearly supported the prosecution's theory. Officer David Babcock, an evidence technician for the Forensic Services Division, testified that the bullet hole in the Explorer's windshield came from a shot fired within the vehicle. Babcock determined that a fired bullet found lying on the driver's seat must have passed through Murphy's body and landed on the seat. However, there was no hole in the seat of the car to suggest that it or any other bullet was fired from the back. Although the physical evidence did not conclusively establish that the bullets were fired from the passenger seat, it supported this theory. On the other hand, there was no physical evidence tending to support the "back seat" theory. Under these circumstances, we do not find it more probable than not that Officer Childs' objectionable testimony affected the outcome of trial.

Defendant relies on *People v Hubbard*, 209 Mich App 234, 238, 241-243; 530 NW2d 130 (1995), where this Court held that the prosecution could not introduce a police officer's expert testimony on profiles of drug dealers (e.g., that they use improper license plates, carry large amounts of cash, and do not carry identification) to prove that the defendant was dealing drugs. In that case, however, the drug profile evidence was a substantial part of the prosecution's case, and this Court determined that the probative value was outweighed by the danger of unfair prejudice. *Id.* at 241. Here, where Officer Childs' opinion was of comparatively minor importance in the totality of the evidence against defendant, we do not reach that conclusion.

IV

Defendant raises a claim of ineffective assistance of counsel, based on the following excerpt from defense counsel's opening statement:

> The defendant went through this ordeal [the interrogation], until he indicated that he wanted to exonerate himself. Then he was taken to another location at headquarters, supposedly, a polygrapher for a polygraph and there, the defendant wrote out a statement. Okay? This statement the defendant wrote out. He indicated that he wrote it. And he wrote some things out. He thought that the officers would let him go if he wrote these statements out.

The prosecutor did not object to this statement, but, during a sidebar with the trial court, both attorneys acknowledged that they could not elicit testimony that defendant took or failed a polygraph test. Subsequently, Officer Andrew Sims, who had administered the polygraph, testified that he had been privy to "physical" evidence, which he described as "information from a reliable source while talking to Mr. Ferguson." This "independent source evidence" led him to believe that defendant was not truthful when he denied shooting Murphy. Defendant contends that defense counsel's reference to a polygraph deprived him of the effective assistance of counsel because it enabled the jurors to infer from Officer Sims' testimony that the "independent source evidence" was the polygraph, which in turn allowed the jurors to infer that he failed the polygraph examination.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Defendant correctly states that polygraph evidence is inadmissible. "It is a bright-line rule that reference to taking or passing a polygraph test is error." *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). Consequently, by referring to the polygraph examination in his opening argument, defense counsel referred to a fact that neither he nor the prosecutor could have introduced into evidence. However, this was neither a highly prejudicial error nor an outcome-determinative one. Defense counsel did not state whether defendant actually took a polygraph test, only that he was taken to another location "supposedly" for a polygraph. He also suggested that defendant wanted to take the exam to exonerate himself. Defendant has not overcome the possibility that defense counsel deliberately injected the polygraph issue as a matter of strategy, hoping that the jurors would infer that defendant's desire to take a polygraph showed that he was being truthful when he denied shooting Murphy.

We also reject defendant's claim that the erroneous reference created a prejudicial effect when Officer Sims testified about the "independent source evidence." Defendant's argument that the jurors would have necessarily inferred that he was referring to the polygraph, and that defendant therefore failed the polygraph, is too attenuated to establish a prejudicial or outcome-determinative error. Accordingly, we reject this claim of error.

V

Finally, defendant argues that the trial court erred in relying on the statutory sentencing guidelines rather than the former judicial sentencing guidelines. We agree.

Defendant correctly observes that the statutory sentencing guidelines do not apply to this offense because it occurred prior to January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). When the scoring of the guidelines was discussed at sentencing, the trial court and the parties correctly acknowledged that the judicial guidelines applied. When addressing the question of scoring, however, the court indicated that it was consulting a "1998-1999 edition of the Sentencing Guidelines." It is apparent from the subsequent discussion of this matter that the parties and the court erroneously consulted a manual governing the statutory guidelines, not the judicial guidelines.

Although defendant failed to preserve this issue with an appropriate objection at sentencing, we conclude that resentencing is warranted because of plain error affecting defendant's substantial rights. *Carines, supra*. Whereas the applicable minimum sentence range under the statutory guidelines, on which the trial court relied, was 144 to 240 months, the corresponding ranges under the judicial guidelines would be either 48 to 180 months, or 96 to

300 months, depending on whether defendant is placed in offense variable level II or III.[2] Although the ranges for the judicial and statutory guidelines overlap, and although defendant's minimum sentence of 144 months is within both ranges, the overall range under the judicial guidelines may be markedly lower. We are uncertain if utilization of the correct judicial guidelines would have impacted the sentence imposed by the trial court. Since the sentence imposed fits either of the guidelines, the trial court, in its discretion may impose the same sentence, or impose a sentence authorized under the law reflecting the use of the correct guidelines. We therefore vacate defendant's sentence for second-degree murder and remand for resentencing on that offense.

Defendant's convictions are affirmed, and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio

[2] In the sentencing information report as originally prepared, OV 3 was scored at ten points, placing defendant in offense severity level II. The trial court ultimately scored OV 6, the corresponding offense variable under the statutory guidelines, at twenty-five points. If OV 3 of the judicial guidelines is scored in a similar manner, defendant's total offense level score would be twenty-five, placing him in offense severity level III.