STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2004
v	No. 250163 Muskegon Circuit Court
MORRIS PAUL ROGERS, Defendant-Appellant.	LC No. 03-048566-FC

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of assault with intent to commit murder in violation of MCL 750.83, for which he was sentenced as a fourth-offense habitual offender to twenty-three to forty years' imprisonment; possession of a firearm by a person previously convicted of a felony in violation of MCL 750.224f, for which he received one to fifteen years' imprisonment; and one count of possession of a firearm during the commission of a felony in violation of MCL 750.227b, for which he received two years' imprisonment. We affirm defendant's convictions and sentences.

During the early morning hours of January 18, 2003, approximately fifteen to eighteen people were gathered in the basement of a home owned by Sandra Jones. The people were drinking and socializing, and some of the people, including defendant and the victim, Kenyatta Jones, were playing dice. At some point, an argument began between defendant and the victim when, according to his own testimony, the victim began making fun of defendant because defendant was losing money in the game.

Thereafter, defendant apparently became loud and began arguing not only with the victim but with others at the table. At this point, Sandra Jones told defendant to leave the house and began pushing defendant up a flight of stairs that led to the outside of the house. It appears from the testimony that defendant was somewhat compliant with Jones' demand and, indeed, went up the steps, but walked backwards up the steps and continued to argue with the victim and others. Apparently, defendant would also occasionally push Jones back as she was pushing him up the steps. Jones eventually managed to get defendant to the top of the steps and outside the house. However, during this time, the victim and others, had walked up to the top of the steps and exchanged words with defendant. Upon seeing the victim, defendant said something derogatory then produced a pistol and shot her.

Defendant first asserts that his trial counsel was ineffective for failing to request that the jurors be instructed on self-defense. Claims of ineffective assistance of counsel are reviewed de novo. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002). In order to prevail on his claim of ineffective assistance of counsel, "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 Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). The second prong, prejudice, requires that defendant demonstrate a probability of a different outcome sufficient to undermine the confidence in the outcome that actually resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

The record reveals that defendant's trial counsel declined to request that the jurors be instructed on self-defense because he believed that, under our Supreme Court's decision in *People v Droste*, 160 Mich 66; 125 NW 87 (1910), he could not request the instruction when defendant had not admitted to the shooting. Defendant, however, asserts that *Droste* does not prevent him from requesting that the jurors be instructed on self-defense, even when he denies having committed the shooting, so long as the instruction is requested and there is evidence to support the theory because he is allowed to assert inconsistent defenses, relying on our Supreme Court's decision in *People v Heflin*, 434 Mich 482; 456 NW2d 10 (1990).

Even assuming, without deciding, that defendant is correct in his assertion that *Droste* does not prevent the jurors from being instructed on self-defense when defendant denied having shot the victim, and that there was adequate evidence to support the instruction's being given, we do not believe that defendant has met his burden of establishing that his trial counsel was ineffective. Defendant's establishing that his trial counsel misinterpreted the law regarding whether the trial court was required to deliver the self-defense instruction, even if considered objectively unreasonable, and showing that there is a reasonable probability that the trial court would have been required to deliver the instruction had it been requested, does not fulfill his burden of establishing prejudice. Rather, in order to fulfill his burden of demonstrating a probability of a different outcome sufficient to undermine the confidence in his conviction, defendant must demonstrate that the evidence introduced at trial in support of his assertion of self-defense was sufficient to show a reasonable probability that the jury would have determined that he did, indeed, act in self-defense. In the present case we do not believe that defendant has done so.

In support of his assertion that evidence at trial supported the reading of the self-defense instruction, defendant relies solely upon the testimony of sergeant Gary Cheatum that, when he called defendant on his cell phone after the shooting, defendant stated "it was self defense. It was self defense. He [sic, She] pulled a gun on me [first]." However, there was no evidence introduced at trial to support defendant's assertion to Cheatum. Indeed, none of the witnesses that were present when the shooting occurred testified that they saw the victim, or anyone else other than defendant, with a gun at any time or supported defendant's assertion that the victim was the initial aggressor. Further, the testimony of the officers that responded to the shooting and conducted the investigation establishes that no gun was found at the scene and that no information was ever received tending to show that anyone other than defendant had a gun on the night of the incident. Moreover, the only testimony presented at trial tending to show that the victim did anything other than merely walk up the steps and stand behind Sandra Jones came

from defendant's brother-in-law, Wilbur Sargent, who testified that the victim and approximately six or seven of the victim's friends followed him up the stairs as Sandra Jones was removing defendant from the house and that, as they were walking up the stairs, the victim was "trash talking" to defendant. Sargent also testified that the victim and his friends followed defendant outside the house and, thereafter, all of them began "trash talking" to defendant. However, Sargent testified that he did not see the victim with a gun at any time and, moreover, walked away from the house in the opposite direction of defendant and, indeed, did not see the shooting. Thus, although it tends to show that the victim may have been making comments to defendant, Sargent's testimony does not support defendant's assertion to Cheatum that the victim either possessed a weapon or was the initial aggressor. Therefore, because the evidence supporting defendant's theory of self-defense consisted solely of his assertion to Cheatum and was not supported by any other evidence presented at trial, thus making it minimal, defendant has not demonstrated a probability of a different outcome sufficient to undermine the confidence in his conviction.

Defendant next asserts that his trial counsel was ineffective for failing to request that the jury be instructed on provocation. Again, we disagree. Defendant correctly asserts that this Court has held that "if a defendant would have been guilty of manslaughter had the assault resulted in death (due to an absence of malice), there can be no conviction of assault with intent to murder." *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988). The elements of voluntary manslaughter are (1) that the defendant killed in the heat of passion, (2) that the passion was caused by adequate provocation, and (3) there was not a lapse of time during which a reasonable person could have controlled his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). It is the element of provocation that distinguishes manslaughter from murder. *Id.* The degree of provocation required to mitigate a homicide from murder to manslaughter "is that which causes the defendant to act out of passion rather than reason." *Id.* In order for the provocation to be adequate, it must be "that which would cause a *reasonable person* to lose control." *Id.* (emphasis in original). "The determination of what is reasonable provocation is a question of fact for the factfinder." *Id.* However, "[w]here, as a matter of law, no reasonable jury could find that the provocation was adequate, the judge may exclude evidence of the provocation." *Id.*

The sole evidence of any provocation by the victim in the present case consists merely of insulting words. Although our Supreme Court has declined to adopt a per se rule that insulting words may never constitute adequate provocation, *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991), we conclude that, based on the facts of this case, no reasonable juror could conclude that the victim's words would have provoked a reasonable person to react as defendant did. Thus, there was insufficient evidence as a matter of law to establish adequate provocation. Therefore, defendant's assertion of ineffective assistance of counsel is without merit, because he has not shown that his trial counsel's failure to request the instruction was objectively unreasonable or that there is a reasonable probability that the outcome of his trial would have been different had his trial counsel requested the instruction. Further, counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also raises several assertions of error in propria persona. First, defendant asserts that he was inappropriately sentenced as a fourth-offense habitual offender, pursuant to MCL 769.12, based on his assertion that the prosecution never established that defendant was

convicted of larceny in a building in 1976, one of the convictions listed in its notice to seek an enhanced sentence, as required by MCL 769.13. Defendant's assertion is without merit. Although defendant has failed to provide this Court with a copy of the PSIR as required by MCR 7.212(C)(7), the record reflects that the prosecutor stated at the sentencing hearing that the PSIR did not list such a conviction and that he had not obtained court records to prove the conviction. Therefore, he moved to amend the habitual offender notice by adding a conviction for receiving and concealing over $100 in 1979 and striking the larceny in a building conviction. Defense counsel stated that he had no objection to that amendment. Thereafter, the prosecutor asked the court to make a finding that defendant is a fourth-offense habitual offender, and defense counsel stated "I have no response to that. We are aware of the defendant's record, and we're not contesting that he has three prior felonies."

Defendant has not challenged the existence or the accuracy of the receiving and concealing conviction. Moreover, this Court has stated that "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Thus, because defense counsel did not object to the prosecutor's motion to amend the grounds upon which he sought enhancement of defendant's sentence and responded to the prosecutor's request that the trial court find that defendant is a fourth-offense habitual offender by stating that he did not contest that defendant has three prior felony convictions, defendant has waived review of the trial court's determination that he is a fourth-offense habitual offender.

Defendant next asserts that his conviction must be reversed because he was never arraigned in the district court on the charge of assault with intent to commit murder. In the initial complaint, defendant was only charged with assault with intent to commit great bodily harm, felony-firearm, and possession of a firearm by a person convicted of a felony. Defendant does not deny that he was arraigned on those charges in the district court. However, at defendant's preliminary examination, the prosecutor moved to amend the charges to add the count of assault with intent to commit murder. After the trial court informed defendant, who was appearing in propria persona at the time, that the maximum penalty for that charge was life imprisonment, the trial court allowed the prosecutor to amend the complaint and thereafter held the preliminary examination, after which it found that probable cause existed to believe that defendant had committed all four of the crimes charged.

First, our Supreme Court has held that the right to an arraignment is a procedural right that can be waived by defendant through his counsel. *People v Phillips*, 383 Mich 464, 470; 175 NW2d 740 (1970). In the present case, during a discussion at defendant's trial concerning the charge of assault with intent to commit great bodily harm and the charge of assault with intent to commit murder, defendant's trial counsel, who was appointed after the preliminary examination, specifically stated, "I have no legal challenge at this point to the magistrate adding or allowing—granting the prosecutor's motion to add the assault with intent to commit murder. I can't defeat that." "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *Aldrich*, *supra*, 111. Therefore, defense counsel's express statement on the record that he had no legal challenge to the amendment constitutes a waiver of this issue.

Even if we were to review defendant's assertion, we find it to be without merit. Defendant relies on this Court's holding in *People v Thomason*, 173 Mich App 812; 434 NW2d

456 (1988), in support of his assertion that his conviction must be reversed because he was not arraigned on the charge of assault with intent to commit murder. However, the present case is distinguishable from *Thomason* because the defendant in *Thomason* received no arraignment at all. *Id.*, 814. Defendant in the present case admits to being arraigned on the original three charges and only asserts that he was not arraigned on the later added charge of assault with intent to commit murder. As stated above, our Supreme Court has stated that the right to an arraignment is a procedural right. *Phillips, supra,* 470; see also *Thomason, supra,* 815. MCL 769.26 provides that a verdict shall not be set aside nor a new trial granted on the basis of a procedural error unless it affirmatively appears that the error resulted in a miscarriage of justice. Our Supreme Court has stated that, under the statute, reversal is not required if the error is harmless. *People v Mateo,* 453 Mich 203, 211-212; 551 NW2d 891 (1996). We believe that, under the facts of the present case, any error was harmless.

Specifically, because defendant admits that he was arraigned on the original charges, and because the record indicates that he signed an advice of rights form on the same date that he was arraigned on those charges, defendant does not dispute that he was informed of his right to counsel, that bail was fixed, and that the preliminary examination was fixed. Further, the trial judge informed defendant of the maximum penalty for the charge of assault with intent to commit murder at the preliminary examination. Moreover, at trial, after defendant had retained counsel, a lengthy plea discussion was held on the record during which the trial court explained to defendant the possible sentence that could be imposed if he were convicted of assault with intent to commit murder and also explained what the penalty would be if defendant were to plead guilty, after which defendant elected to exercise his right to a jury trial. Thus, the purposes of arraignment stated in *Thomason, supra,* 815, were met in the present case. Finally, the added charge of assault with intent to commit murder differs from the charge of assault with intent to commit great bodily harm, on which defendant was arraigned, only with respect to the element of intent. MCL 750.83; MCL 750.84. Thus, because the addition of the charge of assault with intent to commit murder was based on the same facts and evidence upon which defendant had been charged with assault with intent to commit great bodily harm, defendant was not prejudiced in his ability to prepare his defense.

Defendant also asserts that his convictions must be reversed because the trial court allowed him to dismiss his counsel at the beginning of his preliminary examination and did not inform him of the dangers of self-representation. Again, defendant's assertion is without merit.

Under the Sixth Amendment, a criminal defendant has the right to the assistance of counsel at "critical stages" of the proceedings, which includes preliminary proceedings where there is the potential that the defendant may sacrifice rights or lose defenses. *People v Green,* 260 Mich App 392, 399; 677 NW2d 363 (2004) (citations omitted). However, our Supreme Court has also recognized that, in Michigan, a criminal defendant is guaranteed the right to waive the assistance of counsel and proceed in propria persona. *People v Adkins (After Remand),* 452 Mich 702, 720; 551 NW2d 108 (1996), citing Const 1963, art 1, § 13 and MCL 763.1. However, strict guidelines exist with which a trial court must comply before allowing a defendant to waive his right to counsel and exercise his right to proceed in propria persona. *People v Hicks,* 259 Mich App 518, 523; 675 NW2d 599 (2003) (citations omitted).

The trial judge in the present case did not comply with all of the necessary procedures. Specifically, although defendant's request to represent himself was unequivocal, the trial court

did not advise defendant of the risks and disadvantages of exercising his right to proceed in propria persona. *Hicks, supra,* 523. Nonetheless, we do not believe that this error is sufficient to require reversal. Specifically, this Court has stated that "an error in the preliminary examination procedure must have affected the bindover and have adversely affected the fairness or reliability of the trial itself to warrant reversal." *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003). In the present case, defendant's only assertion relating to an effect on the bindover is that he was improperly bound over on the charge of assault with intent to commit murder, which was added at the preliminary examination after he had dismissed his counsel. However, as discussed above, we believe that any error in the trial court's allowing the prosecutor to add the new count, if not waived, was harmless. As to the fairness or reliability of the trial, defendant was appointed new counsel approximately two weeks after the preliminary examination, who represented him throughout the remainder of the pretrial proceedings and during the course of trial, and defendant does not assert that his counsel was prevented from asserting any defenses as a result of defendant's having appeared in propria persona at the preliminary examination.

Defendant next raises numerous allegations of error concerning the trial court's instructions to the jury on the use of prior inconsistent statements, their consideration of whether defendant had a motive to commit the crime, and the consideration of lesser included offenses. However, defendant's counsel specifically stated that he had no objections to the instructions after they had been read to the jurors. "This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no 'error' to review." *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

Finally, defendant asserts that his conviction for being a felon in possession must be reversed based on his allegation that the trial judge improperly instructed the jury that defendant had previously been convicted of a felony, thereby making it illegal for him to carry or possess a firearm, thereby depriving defendant of the right to have a jury determine whether each element of the crime had been proven beyond a reasonable doubt. First, defendant has waived review of this issue for the reason stated above. *Carter, supra,* 219. Second, defendant stipulated during trial that he had been convicted of a felony and that it was therefore illegal for him to carry or possess a firearm. Finally, the record shows that the trial court did not, as defendant asserts, instruct the jurors that defendant had been convicted of a felony but, instead, instructed them that they must determine whether the prosecution had proven that element beyond a reasonable doubt.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad