

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAMMY BURSE,

Defendant-Appellant.

UNPUBLISHED

September 23, 2004

No. 248601

Wayne Circuit Court

LC No. 02-012174-01

Before: Murphy, P.J., and O’Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for first-degree felony murder, MCL 750.316. Defendant was sentenced to life imprisonment. We affirm.

According to defendant’s statement to police, this case arose when defendant grew frustrated with her daughter, initiated a physical altercation with her, and told her, “I brought you in this world, and I will take you out.” As the altercation escalated, defendant stabbed her daughter with a pair of scissors. The daughter began begging forgiveness, but defendant continued to stab her, later stating that she did not think her daughter was sincere. After the victim stopped moving, defendant left off stabbing her with the scissors and retrieved a knife from the kitchen. Defendant “took the knife back to her room and just started cutting on her.” While defendant was “cutting on her, she kept trying to get away, so I started choking on her and cutting on her some more.” Police found the victim’s dead body stuffed into a closet. The victim’s body had thirteen stab wounds consistent with a pair of scissors, and another twenty-seven consistent with a knife.

Defendant first argues that the prosecution abused its discretion when it duplicitously charged defendant with both premeditated and felony murder when, in fact, only one murder occurred. We disagree. As an initial matter, the prosecutor presented overwhelming evidence that defendant had sufficient time to take a “second look” while retrieving the knife, attempted to manually strangle the victim, and hid the body. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Because of the existence of these indications of premeditation and deliberation, the prosecution did not abuse its discretion when it charged defendant with premeditated murder.

Defendant further argues, however, that the prosecution abused its discretion when it charged defendant with two counts of first-degree murder rather than one count of first-degree

murder supported by two theories. We agree that this was error, but disagree that it requires any remedial action on appeal. Defendant failed to preserve this issue in the trial court, so we will not reverse the conviction unless we find plain error that affected her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant's substantial rights were not affected, because the trial court functionally treated the case as one murder tried under separate theories. The trial court and attorneys made it clear that the murder only involved one victim, and the trial court brought the jury back into the courtroom after it reached a verdict on only one count. Defense counsel also clarified that the prosecutor's separate charges merely represented different theories to obtain one first-degree murder conviction. The jury ultimately exonerated defendant of premeditated murder and instead returned a guilty verdict on the lesser offense of second-degree murder. Under these circumstances, defendant fails to demonstrate any impairment of her substantial rights by the mere presence of the multiple charges. Regarding the result of the convictions, the trial court simply merged the second-degree murder conviction into the felony-murder conviction, so defendant does not face any multiple punishment that would require resentencing. Cf. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant next argues that defense counsel provided ineffective assistance by "permitting" the prosecutor to present evidence that should have been excluded. We disagree. Defendant moved for a new trial, but failed to make any additions to the record. Therefore, our review is limited to the mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). During cross-examination, defense counsel asked defendant's ex-husband if he had ever seen defendant physically abuse her children, and he answered that he had not. Defense counsel then ended the examination, and the prosecutor immediately requested a sidebar discussion, which the court granted. On redirect examination, the prosecutor attempted to elicit from the witness the history behind a scar above his eye. Defense counsel objected to the testimony as irrelevant, but the trial court reminded counsel of the sidebar, suggested that counsel opened the door to the testimony's admission into evidence, and overruled the objection. The prosecutor then elicited the ex-husband's testimony that defendant once stabbed him over his eye with a kitchen knife.

Defendant now argues that she was denied effective assistance of counsel because her trial counsel either erroneously opened the door to the introduction of the evidence or failed to adequately argue that the evidence was improper in any event. We disagree. The record indicates that defense counsel opposed the introduction of the evidence with a record objection and at sidebar, so the only issue is whether defense counsel provided ineffective assistance when he "opened the door" to the evidence's introduction. Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

At trial, defendant based her defense on the theory that her daughter provoked defendant into a minor physical altercation which escalated commensurate with the heat of passion and led to the daughter attempting to stab defendant with the scissors. Defendant claimed that the attempted stabbing pushed her into such a frenzy that she could not control her lethal acts after she wrested the scissors from her daughter's hands. Therefore, the evidence that defendant was characteristically a nonviolent and even-tempered mother advanced her theory that she acted in the heat of passion in the face of extreme provocation rather than according to habitually abusive and irrational instincts. Defendant could present this evidence of her peacefulness under MRE

404(a)(1). However, introducing the evidence meant running the risk that the judge would allow the prosecutor to rebut the evidence of defendant's domestic peacefulness with evidence that she stabbed her ex-husband. Defense counsel's decision to present the evidence would necessarily require weighing this risk against the value of the evidence desired, and taking the path that best suited the defense strategy. Because defense counsel's decision to introduce the evidence was squarely a question of sound strategy, it could not amount to ineffective assistance. *LeBlanc, supra*.

Defendant next argues that the trial court erred in denying defendant's request for a jury instruction on manslaughter. We disagree. Legal errors in jury instructions are reviewed de novo, *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), but we review for abuse of discretion a trial court's determination that the facts do not warrant a particular instruction. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). A trial judge must instruct the jury on a necessarily included lesser offense only if there is a disputed factual element in the greater offense that is not included in the lesser offense, and a rational view of the evidence supports the instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

In this case, the missing element was malice. Before a court allows an instruction on manslaughter, however, the evidence must fairly support the proposition that the defendant lacked malice. In this case, defendant argues that the heat of passion initiated by adequate provocation clouded her mind so that her inflamed emotions, rather than malice, compelled her to stab, choke, and cut her daughter to death. The evidence, however, fails to provide rational support for this theory, because defendant had stabbed her daughter into incapacitation and defenseless submission when she left the room to retrieve a more lethal weapon. Under the circumstances, a rational person, who was not acting maliciously, would have regained emotional control during the journey from the bedroom to the kitchen, the search for the knife, and the return trip to the bedroom. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Therefore, the trial court properly denied defendant's request for a manslaughter instruction because it was not supported by a rational view of the evidence. *People v Reese*, 466 Mich 440, 446, 448; 647 NW2d 498 (2002).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage