STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2008
v LORENZO GAFFNEY, Defendant-Appellant.	No. 272908 Wayne Circuit Court LC No. 06-003390-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v LEON MINGO, Defendant-Appellant.	No. 272912 Wayne Circuit Court LC No. 06-003390-01

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In Docket No. 272908, defendant, Lorenzo Gaffney, appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The court sentenced Gaffney to 20 to 35 years' imprisonment for his second-degree murder conviction and two years' imprisonment for his felony-firearm conviction. We affirm.

In Docket No. 272912 defendant, Leon Mingo, appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL

[1] Although Gaffney was originally charged with first-degree premeditated murder, MCL 750.316, the court found Gaffney guilty of the lesser offense of second-degree murder because the killing was not premeditated.

750.224f, and felony-firearm, MCL 750.227b.[2] The trial court sentenced Mingo to 28 to 40 years' imprisonment for his second-degree murder conviction, one to five years' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. We affirm this decision as well.

I. FACTS

Defendants Mingo and Gaffney are cousins, and this case arises out of a killing that occurred during a gunfight involving both. On February 15, 2006, Jahon Duncan met Mingo, Gaffney, and Gaffney's brother, Deandre,[3] near Third and Calvert Streets in Detroit. Around this time, Tony Turner came out of the house at 749 Calvert Street and called to Duncan. Duncan crossed the street to see Turner, while Mingo and Gaffney stayed on the other side of the street. According to Duncan, Turner then yelled at Gaffney and Mingo in a threatening manner and the three started arguing. Duncan heard someone yell, "What you looking at [sic]?" and saw Mingo and Turner pull out their guns and point them at each other.

Several different accounts exist of what occurred next. According to Duncan, after someone yelled, "What you looking at [sic]," and Mingo and Turner pulled out guns and pointed them at each other, Gaffney grabbed Mingo's gun and ran toward the alley near Calvert and Collingwood Streets with Mingo.

According to a statement Gaffney later provided police, Turner shot at him first and Mingo gave Gaffney a nine-millimeter handgun. Gaffney, Mingo, and Deandre then ran through the alley to Gaffney's house to get some more guns. Mingo retrieved an AK-47 from the house for himself, while Deandre gave Gaffney an AK-47. Gaffney, Mingo, and Deandre returned to the alley between Collingwood and Calvert Streets. Turner was on the porch at 749 Calvert. Gaffney fired his AK-47 eight times at Turner, and then ran home and called his girlfriend to come and pick him up.[4]

According to Mingo's statement to police, there had been an ongoing fight between Gaffney and Turner before the date at issue. When Mingo first saw Turner across the street, while walking with Duncan and Gaffney, he thought that Turner was armed, so he pulled out his nine-millimeter handgun and held it at his side. Shortly thereafter, Gaffney asked Mingo for the nine-millimeter, and Mingo gave it to him before running into an alley. Mingo then heard gunfire and ran to his house where he retrieved an AK-47, which he gave to Gaffney. Gaffney ran and started firing the AK-47. Mingo, however, ran back into the house to retrieve an "SK" and returned to the corner. Mingo denied firing a gun during this entire incident.[5]

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[2] Although Mingo was originally charged with first-degree premeditated murder, MCL 750.316, the court found him guilty, as an aider and abetter, of the lesser offense of second-degree murder because the killing was not premeditated.

[3] No last name was provided.

[4] This statement was only admitted against Gaffney.

[5] This statement was only admitted against Mingo.

Latoya Hall was at 749 Calvert Street while these shootings occurred. She was with several other adults and children, including Turner's girlfriend, Shavace Lowman, and eight-year-old Tyshawn Stinson. After hearing two rounds of gunfire, Hall looked out the side window of the house and saw Mingo, Dario, Gaffney, defendant Gaffney's brother, and Duncan, as well as a fourth individual, in an alley in front of the house pointing their guns at the house. Bullets started coming into the house, and the children congregated near the front window to watch events unfold. As Hall went to take the children away from the window, Stinson was shot in the head and fatally wounded.

Nearly eight months after the trial concluded, Gaffney requested a *Ginther*[6] hearing to determine whether trial counsel's failure to request a *Walker*[7] hearing concerning his confession to police and failure to investigate witnesses deprived him of the effective assistance of counsel. The trial court denied the motion, reasoning that Gaffney had cited "no factual basis upon which one could discern that [Gaffney] didn't make a voluntary statement or that he was under duress or that improper methods were used[,]" and that the failure to call witnesses was not only a matter of trial strategy but, also, Gaffney had failed to proffer the testimony of any witness that he wanted investigated.

II. EFFECTIVE ASSISTANCE OF COUNSEL

On appeal, Gaffney argues that trial counsel's failure to request a *Walker* hearing and to investigate witnesses denied him the effective assistance of counsel and the trial court's denial of his motion for a *Ginther* hearing was an abuse of discretion. We disagree.

A. Standard of Review

Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.* Where there is no evidentiary hearing, this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002). We review a trial court's denial of a motion for a *Ginther* hearing for an abuse of discretion. See *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999).

B. Analysis

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a

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

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

reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

In claiming a *Walker* hearing was necessary, Gaffney asserts that trial counsel should have been aware that Gaffney had only a sixth grade education and had difficulty reading and writing based on his access to the preliminary examination transcript wherein Gaffney's original counsel had indicated that any issues regarding the admissibility of Gaffney's confession could be resolved at a *Walker* hearing.[8] This argument is without merit.

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). At the outset, we note that defendant's claim only relates to whether his confession was voluntary. A waiver is voluntary if "'"it was the product of a free and deliberate choice rather than intimidation, coercion or deception."'" *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000), quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986), quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1996).

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Wells*, 238 Mich App 383, 387; 605 NW2d 374 (1999), quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

We note that the only evidence presented at the preliminary examination concerning Gaffney's education was that Gaffney had a ninth grade education level (rather than a sixth grade education) and no evidence was presented showing that Gaffney had difficulty reading or writing as he asserts on appeal.[9] However, even assuming trial counsel was aware of Gaffney's education and literacy as Gaffney claims, the failure to request a *Walker* hearing did not deny Gaffney the effective assistance of counsel. Indeed, evidence was presented both at trial and the preliminary examination that Gaffney, himself, read his rights out loud to police, indicated that

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[8] New counsel was appointed to represent Gaffney at trial.

[9] Gaffney cites his presentence investigation report (PSIR) in support of his assertions regarding his education and literacy levels.

he understood them, and told police he had a ninth grade education level. If anything, this contradicts Gaffney's claim that he had a sixth grade education and difficulty reading. Further, evidence was presented at the preliminary examination that Gaffney was only in custody for an hour and 15 minutes before the interrogation began, did not appear to be nor indicate that he was under the influence of any drugs or alcohol, and did not request food, water, or medication. In light of these facts, it appears Gaffney's confession was made voluntarily. Therefore, any request for a *Walker* hearing would have been futile. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Consequently, the failure to request a *Walker* hearing did not deny Gaffney the effective assistance of counsel.

Gaffney also contends that trial counsel's failure to investigate witnesses who could have testified that he did not fire any shots at 749 Calvert Street denied him the effective assistance of counsel. This claim fails. Although a defense counsel's failure to reasonably investigate a case may constitute ineffective assistance, this Court must afford deference to counsel's strategic judgments. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005); *Matuszak*, *supra* at 58. However, "strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674; (1984). Moreover, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902 (1996).

Here, Gaffney has failed to specify the names of any witnesses that counsel failed to investigate. Moreover, although Gaffney asserts on appeal that witnesses could have provided testimony that he did not shoot at 749 Calvert Street, such information was not proffered below. In light of this, even if counsel's investigation were incomplete, it can hardly be argued that trial counsel failed to exercise reasonable professional judgment. Regardless, even if counsel failed to call witnesses who would have testified that Gaffney did not fire any shots at 749 Calvert Street as Gaffney asserts on appeal, such testimony would have contradicted Gaffney's own confession to police in which he admitted firing an AK-47 at Turner who was standing in front of 749 Calvert Street. In light of Gaffney's statement, it does not appear that the failure to call additional witnesses would have been outcome determinative. Consequently, Gaffney was not denied a substantial defense. Therefore, Gaffney was not denied the effective assistance of counsel. Given that Gaffney's confession was voluntary and the failure to investigate unnamed witnesses did not deny Gaffney a substantial defense, the trial court's denial of his motion for a *Ginther* hearing was not an abuse of discretion.

III. IMPERFECT SELF DEFENSE

Mingo argues that the trial court erred in failing to consider the doctrine of imperfect self-defense, which would have resulted in a conviction of voluntary manslaughter rather than second-degree murder. We disagree.

A. Standard of Review

This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). However, this Court reviews a trial court's factual findings in a bench trial for clear error. MCR 2.613(C); *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). A finding is clearly erroneous if, after a review of the entire record, the appellate court is "left with a definite and firm conviction that a mistake has been made." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

B. Analysis

"Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. The doctrine applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor."[10] *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992) (internal citation omitted).

> As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]

Here, regardless of whether Mingo was the initial aggressor, he would not have been entitled to a claim of self-defense because the use of deadly force was completely unnecessary.[11] Specifically, the evidence supported the trial court's findings that after initially leaving the scene upon hearing gunfire, Mingo ran to his house and retrieved an AK-47. Mingo gave the AK-47 to Gaffney and then grabbed an "SK" for himself before returning to the scene. In light of the fact that Mingo was able to leave the scene after the initial shots were fired, he was clearly able to avoid the use of deadly force by utilizing an avenue of retreat. However, instead of retreating, Mingo did the opposite by providing Gaffney with an AK-47 and returning to the scene, himself, with an "SK." Therefore, regardless of whether Mingo was the initial aggressor, the trial court properly found that he was not entitled to self-defense. Consequently, the doctrine of imperfect

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[10] Although our Supreme Court has not recognized the doctrine of imperfect self-defense, *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999), "panels of this Court have recognized the doctrine[,]" *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993), citing *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992), and *People v Amos*, 163 Mich App 50, 57; 414 NW2d 147 (1987).

[11] We note that Mingo was convicted of second-degree murder as an aider and abetter under a theory of transferred intent, which "permits culpability for murder where the defendant intended to shoot someone other than [the] actual victim." *People v Abraham*, 256 Mich App 265, 269-270; 662 NW2d 836 (2003).

self-defense is inapplicable.[12]

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette

[12] Mingo also claims that he was denied the effective assistance of counsel because counsel failed to argue the issue of imperfect self-defense before the court at trial. However, "[c]ounsel is not ineffective for failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, this claim fails.