STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2009
v	No. 281871 Huron Circuit Court
BRANDON SCOTT SMITH, Defendant-Appellant.	LC No. 07-004573-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to 22 to 50 years' imprisonment. He appeals as of right. Because we conclude that trial counsel was not ineffective for failing to raise an insanity defense, that defendant's conviction is supported by sufficient evidence, that the trial court did not err in failing to instruct the jury on manslaughter, that defendant's sentence is not cruel or unusual punishment and is not based on inaccurate information, and that the trial court did not engage in impermissible judicial fact-finding, we affirm.

Defendant's conviction arose from the death of the 19-month-old son of his former girlfriend, Ashley Walls. An autopsy showed that the victim died of blunt force trauma to the abdomen. The victim, at the time of his death, lived in an apartment with Walls and defendant.

I. Ineffective Assistance of Counsel

Defendant claims that he was denied the effective assistance of counsel when trial counsel failed to raise an insanity defense based on "pathological intoxication," a form of involuntary intoxication.[1] We disagree. Because no *Ginther*[2] hearing has been held on

[1] "Pathological intoxication" is a self-induced intoxication "in the sense that the defendant knew what substance he was taking, but which was 'grossly excessive in degree, given the amount of the intoxicant.'" LaFave, Criminal Law (2d ed), § 4 10(f), p 394. "[T]he intoxication is involuntary only if the defendant was unaware that he is susceptible to an atypical reaction to the substance taken." *Id.*

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

defendant's claim, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish a claim of ineffective assistance, a defendant must show (1) that trial counsel's actions fell below an objective standard of reasonableness and (2) that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A defendant is legally insane if, at the time of the commission of the offense, he "as a result of mental illness . . . or . . . being mentally retarded . . . lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law." MCL 768.21a(1). Involuntary intoxication is a complete defense to a crime if it makes the defendant temporarily insane within the meaning of MCL 768.21a(1). *People v Wilkins*, 184 Mich App 443, 449; 459 NW2d 57 (1990). A criminal defendant is denied effective assistance of counsel if his attorney fails to investigate and present a meritorious insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988).

Here, there is no evidence in the record that establishes that defendant was intoxicated at the time of the offense. Given the absence of such evidence, defendant has not shown that counsel's failure to raise an insanity defense based on "pathological intoxication" fell below an objective standard of reasonableness. *Frazier, supra*.[3] Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502. Accordingly, defendant was not denied the effective assistance of counsel.

II. Motion for Directed Verdict and Sufficiency of the Evidence

Defendant next argues that the trial court erred in denying his motion for directed verdict. Defendant also claims that his conviction is not supported by sufficient evidence. Defendant asserts that, based on the evidence presented, no rational trier of fact could have found that he committed an act which killed the victim and, even if so, that he acted with malice. We disagree. To resolve both issues, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find beyond a reasonable doubt that all essential elements of the crime were proven. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

"Second-degree murder is a general intent crime." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). The elements of second-degree murder are:

> "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." [*Id*., quoting *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1984).]

[3] For the same reason, we decline defendant's request to remand for a medical evaluation or an evidentiary hearing.

The malice element required for second-degree murder can be inferred from evidence that the defendant intentionally set in motion a force likely to cause great bodily harm or death. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

In this case, Walls left the apartment at approximately 11:00 a.m. When she left, the victim was in his crib crying. Walls returned to the apartment at 12:09 p.m. While Walls was gone, defendant was alone in the apartment with the victim. Defendant told a police officer that the victim cried for 15 to 20 minutes after Walls left. The medical examiner testified that the victim died from blunt force trauma to the abdomen. He stated that the victim's injuries were more likely caused by a fist rather than an open hand, and he likened the victim's injuries to those one would receive in an automobile accident. The medical examiner further testified that, given the victim's size, it was improbable that the victim's injuries were self-inflicted or the result of a fall from the crib. He estimated the time of the victim's death to be between 11:00 a.m. and 12:00 p.m. and stated that, because of the severity of the injuries, the victim lost consciousness four to six minutes after receiving the trauma to his abdomen. According to the medical examiner, if it was true that the victim had cried for 15 to 20 minutes after Walls left the apartment, Walls could not have been the cause of the victim's injuries. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant inflicted the blunt force trauma that killed the victim and that, in doing so, defendant acted with malice. *Cline, supra*; *Aldrich, supra*. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict and the jury's verdict is supported by sufficient evidence.

III. Manslaughter Instruction

Defendant argues that the trial court erred when it failed to instruct the jury on voluntary and involuntary manslaughter. However, defendant specifically requested that the jury not be instructed on manslaughter. Thus, defendant waived the issue, extinguishing any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

IV. Sentencing

Defendant claims that the trial court failed to properly consider mitigating factors when imposing sentence. Defendant, however, fails to describe what mitigating factors the trial court failed to consider. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). In any event, the record is clear that mitigating factors were presented to the trial court and that the court considered the factors when sentencing defendant.

Defendant also claims that his sentence of 22 to 50 years' imprisonment must be vacated because it constitutes cruel and unusual punishment, violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and is based on inaccurate information. We disagree. We review these unpreserved issues for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

Defendant's minimum sentence fell within the recommended minimum sentence range under the legislative guidelines.[4] Therefore, we are required to affirm defendant's sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10). We reject defendant's argument that, because the trial court failed to conduct an assessment of defendant's rehabilitative potential through intensive substance abuse and psychiatric treatment, contrary to MCR 6.425(A)(5), the trial court relied on inaccurate information when it sentenced defendant. MCR 6.425(A)(5) only requires a probation officer to include in the presentence report a description of the defendant's medical history, substance abuse history, and, if applicable, a current psychiatric report. Defendant's past substance abuse and treatment was documented in the presentence report. A presentence report is presumed to be accurate, and a trial court may rely on the report unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant makes no challenge to the accuracy of the presentence report. Accordingly, defendant has failed to show that the trial court relied on inaccurate information.

MCL 769.34(10) does not preclude appellate relief for sentencing errors of constitutional magnitude. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). However, a sentence within the recommended sentence range is presumed proportional, *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995); see also *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003), and a proportional sentence does not constitute cruel or unusual punishment, *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006). Defendant has failed to present evidence to overcome the presumption of proportionality. We, therefore, reject defendant's claim that his sentence constitutes cruel or unusual punishment.

We also reject defendant's claim that the trial court engaged in impermissible judicial fact-finding. Our Supreme Court has definitively held that *Blakely*, *supra*, does not apply to Michigan's indeterminate sentencing scheme. See, e.g., *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). We affirm defendant's sentence.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[4] A trial court must articulate on the record its reasons for imposing a sentence. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). The trial court met the articulation requirement when it relied on the sentencing guidelines in imposing sentence. See *id.* at 313. In addition, the trial court stated that it based the length of defendant's sentence on "all the factors," such as defendant's background and drug abuse and the circumstances of the crime.