STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2012
v	No. 300469 Oakland Circuit Court
FRANK JOHN RICHARD, Defendant-Appellant.	LC No. 2010-230135-FC

Before: SAAD, P.J., and K.F. KELLY and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction for second-degree murder, MCL 750.317. The trial court sentenced defendant to 25 to 75 years' imprisonment. For the reasons set forth below, we affirm.

I. FACTS

In the early morning hours of June 23, 2009, defendant invited the victim into his apartment, which was located on the first floor of an apartment building in Pontiac. Shortly thereafter, defendant stabbed the victim to death with a knife, then dragged the victim's body down the hall to the front porch of the building and, once inside the building, called 911 to report the incident. Officers Scott McDonald and Daniel Main responded to the report and saw defendant in the doorway of the apartment building covered in blood. They handcuffed defendant and asked him if there was anyone else inside the apartment. After defendant responded affirmatively, the officers asked defendant if this person was responsible for the victim's death, and defendant said "No. I stabbed him." Defendant then gave the police multiple conflicting versions of what transpired.

In the meantime, Sergeant Mickens arrived at the scene, and Officers McDonald and Main entered the apartment building to investigate the crime scene. The officers then returned to the porch and read defendant his *Miranda*[1] rights. Defendant agreed to speak with the officers, and subsequently gave the police multiple versions of what transpired. At trial, defendant

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

testified that he was intoxicated at the time he stabbed the victim, and numerous witnesses testified that defendant appeared intoxicated on the night in question.

II. DISCUSSION

Defendant argues that he was denied the effective assistance of counsel. Judicial review of defendant's ineffective assistance of counsel claim is limited to plain errors apparent in the record. See *People v Jordan*, 275 Mich App 659, 712; 739 NW2d 706 (2007).

"The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002) (quotation omitted). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). And, "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Here, defendant claims that his trial counsel was ineffective because she failed to expose the alleged bias of Officers McDonald and Main. Yet, defendant failed to establish the factual predicate necessary to support this claim, because the record does not contain any evidence that the officers were biased against defendant. See *id*. Defendant also asserts that his trial counsel was ineffective because she failed to call Sergeant Mickens and certain character witnesses. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant argues that Sergeant Mickens' testimony might have undermined the veracity of Officers McDonald and Main's trial testimony. However, again, the record does not provide any indication of how Sergeant Mickens would have testified. Thus, defendant fails to establish the factual predicate necessary to support his claim that trial counsel was ineffective for failing to call Sergeant Mickens. See *Hoag*, 460 Mich at 6. Similarly, while defendant claims that his trial counsel was ineffective for failing to call certain character witnesses, defendant does not identify these character witnesses or establish how they would have testified at trial. Clearly, defendant's claim lacks merit. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Accordingly, we hold that defendant failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. *Yost*, 278 Mich App at 387.

Furthermore, defendant has failed to demonstrate a reasonable probability that, but for his trial counsel's alleged failure to expose the alleged bias of the officers or to call Sergeant Mickens and certain character witnesses, the result of his trial would have been different. See *id*. At trial, defendant testified that he stabbed the victim, but that he did so in self-defense. The prosecution presented substantial evidence to establish that defendant did not stab the victim in self-defense. At trial, Dr. Patrick Cho testified as an expert in forensic pathology that there were no signs that the victim struggled or fought his assailant. Defendant's neighbor also testified that he did not hear any arguing, fighting, or struggling on the night in question. Additionally, a

different neighbor testified that defendant had previously said that he was going to "kill this n----r across the street[,]" referring to the victim. In light of this evidence, defendant fails to show "that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id*.

Defendant also makes the brief assertion that the trial court erred when it denied his motion for *Ginther*[2] hearing. However, defendant did not properly present this claim for appeal because he failed to raise it in the statement of questions presented in his appellate brief. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Moreover, we find no merit to this claim.

Defendant argues that the trial court erred by admitting his incriminating statements to the police officers and that his trial counsel was ineffective because she failed to call an expert witness related to intoxication. Defendant preserved the issue regarding the admissibility of his statements to the police by moving to suppress the statements. *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). "A trial court's ruling on a motion to suppress evidence is reviewed for clear error, but its conclusions of law are reviewed de novo." *Id*.

"The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court established "procedural safeguards . . . to secure the privilege against self-incrimination." Pursuant to *Miranda*, if a criminal defendant is subjected to a custodial interrogation, "[p]rior to any questioning, the [defendant] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney . . . ." *Miranda*, 384 US at 444. Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Tierney*, 266 Mich App at 707. "To establish that a defendant's waiver of his Fifth Amendment right was knowingly and intelligently made, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id*. at 709.

Here, defendant claims that the trial court erred by admitting his statements to the officers because defendant was too intoxicated to understand his *Miranda* rights. However, while "[i]ntoxication from alcohol . . . can affect the validity of a waiver of Fifth Amendment rights . . . [it] is not dispositive." *Id* at 707 (citations omitted). And, importantly, here, at the *Walker*[3] hearing on defendant's motion to suppress his statements to the police officers, defendant testified that the police advised him of his *Miranda* rights and that he fully understood those rights. Thus, the prosecution clearly presented "evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel,

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

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

and that the state could use what he said in a later trial against him." *Id*. Accordingly, defendant has failed to show that the trial court erred in denying his motion to suppress his statements to the police officers. *Unger*, 278 Mich App at 243.

Defendant asserts that the trial court erred in admitting the statements he made to the police before he was *Mirandized*. However, defendant did not properly present this claim for appeal because he failed to raise it in the statement of questions presented in his appellate brief. *Anderson*, 284 Mich App at 16. Moreover, we find that this claim lacks merit because defendant's un-*Mirandized* statements were made in response to the officer's questions asked for safety reasons and, thus, fell under the public safety exception to the *Miranda* rule. See *People v Attebury*, 463 Mich 662, 668-674; 624 NW2d 912 (2001) (holding that *Miranda* does not apply where "the police inquiry . . . [was] necessary to protect the police or the public from an immediate danger").

Defendant also contends that his trial counsel was ineffective because she failed to call an expert witness on intoxication. The trial court appointed a pharmacology expert, but defendant's trial counsel elected not to call this expert. However, defendant's trial counsel elicited testimony from numerous witnesses that defendant was intoxicated on the night in question. Thus, in light of the evidence that was already before the jury, defendant fails to overcome the presumption that trial counsel's failure to call the pharmacology expert constituted sound trial strategy. *Rockey*, 237 Mich App at 76. Moreover, defendant fails to demonstrate a reasonable probability that, but for his trial counsel's failure to call a pharmacology expert, the result of his trial would have been different. *Yost*, 278 Mich App at 387.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly