STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2012
v	No. 302343 Kalamazoo Circuit Court
RICHARD DOUGLAS RIDDLE, Defendant-Appellant.	LC No. 2010-001085-FC

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Defendant Richard Douglas Riddle appeals by right his jury conviction of second-degree murder. MCL 750.317. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to serve 50 to 75 years in prison. Because we conclude that there were no errors warranting relief, we affirm.

This case arose from the stabbing death of defendant's girlfriend, Delores Givhan. Defendant and Givhan were renting a spare bedroom in Barbara Johnson's apartment. On the night at issue, defendant and Givhan were in the apartment's living room watching a basketball game with Johnson and a few friends. At around 10:00 p.m., defendant and Givhan went to their bedroom. Johnson testified that there were no unusual sounds coming from the bedroom, but at about 11:30 p.m. they heard screams from the bedroom. Johnson ran to the bedroom, followed by Michael Chupp and Gary Wells.

Johnson pushed open the door and saw defendant standing in the room with a knife raised near his shoulder; he was fully clothed in a black shirt and jeans, but Givhan was only wearing a tank top. Givhan was falling to her knees as Johnson entered, had a visible gash on her arm, was making a gagging sound, and had a foam substance coming from her mouth. Johnson recognized the knife held by defendant as a butcher knife from her kitchen. Defendant took the knife and put it in his pants and pulled his shirt over it. Johnson said she asked defendant why he "cut her like that?" And defendant responded because "she deserved it 'cause she spent up all his money." Johnson testified that defendant then "walked on by me and went out the door . . . like it wasn't nothing."

Police officers later arrested defendant at a friend's apartment. The officers recovered a knife wrapped in a black and yellow shirt in a dumpster at defendant's friend's apartment. Johnson identified the knife as her butcher knife.

Defendant first argues that the trial court erred when it permitted the admission of statements that Givhan had made to police officers after past instances of domestic violence. He maintains that the admission of these statements violated his Sixth Amendment right to confront the witnesses against him.

Although the contested statements from incidents in 2005 and 2008 qualify for admission under MCL 768.27b and MCL 768.27c, a statutory provision cannot authorize action in violation of the federal constitution. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Although it might be admissible under the general rules of evidence, the Sixth Amendment precludes the admission of testimonial hearsay unless the declarant is unavailable and the defendant had an effective opportunity to cross-examine the declarant. *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008), citing *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). It is plain that the statements at issue were hearsay. See MRE 801. And, because Givhan made them in the safety of hospitals to police officers who were investigating crimes, we also conclude that the statements were testimonial. See *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006) (holding that statements made to police officers during a police investigation are testimonial when there is no "ongoing emergency," and the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). We also acknowledge defendant did not have a chance to cross-examine the victim. While a defendant may forfeit his right to confrontation when he engages in conduct to make the declarant unavailable, see *Crawford*, 541 US at 62, the Supreme Court has made clear that forfeiture by wrongdoing requires that defendant's conduct be "*designed* to prevent the witness from testifying." *Giles v California*, 554 US 353, 360; 128 S Ct 2678; 171 L Ed 2d 488 (2008). Here, defendant did not forfeit his right to confrontation because the prosecution has never argued, and no evidence suggests, that defendant killed the victim to prevent her from testifying.

While the admission of the victim's testimonial hearsay statements was error, error involving the confrontation clause need not be reversed if it was harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004). Under this standard, we "conduct a thorough examination of the record in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (quotation marks and citation omitted). Considering the record as a whole, we conclude that the evidence of defendant's guilt was so overwhelming that the error in the admission of these statements was harmless. While the erroneously admitted statements provided proof of the tumultuous nature of defendant's relationship with the victim, several other sources provided similar information, making the statements cumulative. Notably, defendant described the relationship as "up and down," admitted to fights over money and another woman, and admitted the victim was injured in a past fight. Similarly, a former friend of defendant's testified to witnessing arguments between defendant and the victim while they stayed at his house, and feeling compelled to tell defendant not to hit women. Given this other evidence, the statements were unnecessary to show the tumultuous, even violent, nature of the relationship.

More importantly, the jury was not called upon to determine whether the relationship had a history of violence but to determine defendant's guilt or innocence based only on the incident in question. Considering the day in question and the lack of evidence of defendant's self-defense claim, references to events from years past likely had little, if any, bearing on the jury's verdict. Specifically, defendant admitted to stabbing the victim but claimed it was done in self-defense. At the time of the stabbing, defendant and the victim were alone in the bedroom. Although defendant claimed they argued, no one in the apartment heard sounds of an argument; instead, the only sounds heard were Givhan's screams. Witnesses rushing to the room found defendant with the butcher knife still in his hand, raised up near his shoulder. Despite defendant's claim that Givhan attacked him with a knife, no sharp objects were recovered within reach of her body, or within easy access in the room. When the witnesses entered the room, defendant put the knife in his pants, covered it with his shirt, and calmly left the apartment. He then went to a friend's house, changed his clothes, and attempted to dispose of the knife by wrapping it in a shirt and hiding it in the trash. He told his friend he needed to leave town. Defendant told no one, not the witnesses who rushed into the room, or even his friend, that the victim attacked him and he had responded in self-defense. Rather than claiming self-defense, when asked by one of the witnesses why he had stabbed the victim, defendant responded because "she deserved it 'cause she spent up all his money." When defendant saw police arriving at his friend's apartment building, he again attempted to flee. When apprehended, defendant told the police numerous lies, claiming he had no memory of events, and even suggesting a third person was in the bedroom. He offered his self-defense story only after it had been suggested to him by police, and only after the knife and his discarded shirt were recovered. Defendant's self-defense claim was also at odds with the physical evidence in the case. The victim sustained four serious stab wounds, including one to the center of her chest, but defendant did not have a single scratch. Expert testimony indicated one or two of the victim's wounds could be described as defensive, further rebutting defendant's claim that she was the aggressor. In light of the overwhelming evidence contradicting defendant's claim of self-defense, it is clear beyond a reasonable doubt that a rationale jury would have convicted defendant even without the statements. Therefore defendant is not entitled to any relief. *Shepherd*, 472 Mich at 348.

Next, defendant suggests that he was denied the effective assistance of counsel because his trial lawyer failed to object to the jury instructions and request a more thorough statement of the burden of proof for self-defense. Defendant preserved this claim by moving for a new trial. A claim alleging the denial of effective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and a trial court's findings of fact, if any, are reviewed for clear error. *Id.*

To establish ineffective assistance of counsel, defendant must demonstrate: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Turning to the present case, viewing the jury instructions in their entirety, we conclude the jury was properly instructed that the prosecution bears the burden of demonstrating all the elements of a crime, including, lack of justification. See *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006) (stating that, when reviewing a claim of instructional error, this Court examines the instructions as a whole to determine whether the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried). The trial court repeatedly told the jury that the prosecution must prove each element of a crime beyond a reasonable doubt, and properly instructed it on the elements of the crimes at issue. Moreover, the court clearly instructed the jury that defendant was presumed innocent and was not required "to prove his innocence or to do anything." The trial court also properly instructed the jury on self-defense. Although the trial court did not include an instruction on the prosecution's burden to disprove self-defense, the trial court's general instruction that defendant was not required to prove his innocence, taken in conjunction with the numerous instructions placing the burden of every element on the prosecution and the presumption of defendant's innocence, was sufficient to explain the burden of proof to the jury. A trial judge is not required to instruct specifically on the people's burden to disprove self-defense if the jury has been instructed that the burden rests on the prosecution to establish the defendant's guilt beyond a reasonable doubt. *People v Hunley*, 313 Mich 688, 694-695; 21 NW2d 923 (1946); *People v Palma*, 111 Mich App 684, 690-691; 315 NW2d 182 (1981). We further reject defendant's contention that the burden of proof as explained in the intoxication instruction confused the jury. The instructions were presented as two independent instructions, and the language placing the burden on defendant was unique to the intoxication defense and was not included in the self-defense instruction. On the whole, because the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights, defendant cannot show that but for counsel's failure to request the instruction, the outcome of the trial would have been different. *Strickland*, 466 US at 697.

Finally, we turn to defendant's claim that the trial court erred when it denied his request for a voluntary manslaughter instruction. This Court also reviews de novo claims of instructional error. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, this Court reviews for an abuse of discretion the trial court's decision whether to give an instruction under the facts of the case. *Id.*

Defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). We acknowledge manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). However, because a rational review of the evidence does not support the giving of the instruction, we conclude the trial court did not err in refusing the instruction. *People v McGhee*, 268 Mich App 600, 607; 709 NW2d 595 (2005). To prove voluntary manslaughter the prosecution must demonstrate that defendant "killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Mendoza*, 468 Mich at 535. Here, in defendant's description of the event, he never asserted that he acted in the heat of passion or that his practical reasoning was distorted. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Instead defendant's version was that he rationally responded to a life threatening knife attack; he did not describe circumstances suggestive of voluntary manslaughter, and accordingly there was no need to provide a voluntary manslaughter instruction.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro