STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2012
v	No. 302401 Wayne Circuit Court
LORENZO DAVIS, Defendant-Appellant.	LC No. 07-006937-FC

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316, and sentenced to life in prison without the possibility of parole. Following his conviction, defendant filed a motion for a new trial arguing that he did not receive effective assistance of counsel. After a *Ginther*[1] hearing, the trial court denied the motion. We affirm.

Defendant and the decedent, Alwin May, lived in the same boarding house and got into an argument over the volume of the living room television. The decedent eventually punched defendant in the face hard enough to break the skin. The decedent resumed lying on the floor in front of the television and defendant went and sat on the stairs. Defendant stayed on the stairs for approximately 15 minutes. He then went into the kitchen, snatched a knife out of another resident's hand, returned to where decedent was lying down, stooped down and stabbed the decedent in the chest, killing him.

The jury was properly instructed on first degree premeditated murder and second degree murder and convicted defendant of the first degree charge. Defendant argues that he was denied the effective assistance of counsel by defense counsel's failure to request a jury instruction for voluntary manslaughter. During the *Ginther* hearing, defense counsel testified that he did not think the circumstances of this incident allowed for a voluntary manslaughter instruction. The trial court, however, concluded that it would have given the voluntary manslaughter instruction had defense counsel requested it. Given this, the trial court found that defense counsel's representation of defendant "slightly f[e]ll beneath the reasonableness standard." Nevertheless,

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

the court denied the motion for new trial, concluding that the jury's decision to convict defendant of first degree premeditated murder rather than second degree murder necessitated that the jury made a finding of premeditation and deliberation that would have prevented a conviction of voluntary manslaughter.

We agree with the trial court's reasoning. "[A] jury's rejection of second-degree murder in favor of first-degree murder reflect[s] an unwillingness to convict on a lesser included offense such as manslaughter," and therefore, counsel's failure to request a manslaughter instruction did not cause prejudice. *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997).

Defendant also argues that defense counsel was ineffective for presenting the defense of voluntary intoxication to the jurors because such a defense is not, in fact, recognized under Michigan law. During closing argument defense counsel stated the following:

> The prosecutor claims, and he has argued, that the state of mind was one of an[] intent to murder, of an[] intent to kill. If they can't prove that than you must not, you may not, convict of Murder In The First Degree. But the law makes provision for this and the law will provide for the judge to give you the reduced or lesser offense of Second Degree Murder. If you do not believe that Mr. Davis entertained the premeditated intent to kill than you can't find him guilty of Murder In The First Degree. But, again, [sic] invite you to listen carefully to the Judge, because he is the source of the law that you will have to apply in this case.
>
> The main thing I want to stress here is Michael Berry's testimony. I found Mr. Berry to be a very good witness. He gave a rather detailed narrative of the facts and he also made an observation about Mr. Davis which I found very interesting. He said that normally, Mr. Davis, is a [sic] affable, easy going guy. Not argumentative, doesn't pick fights. He's normally a nice guy, quiet, minds his own business. But, when he drinks, when he drinks, his personality changes completely. He becomes argumentative. He becomes pugnacious. [sic] Wants to fight. [sic] Completely different state of mind.
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> And, Mr. Berry, knows Mr. Davis and he's seen him before like that. So, he knows the difference between Mr. Davis drunk and Mr. Davis sober. Apparently, that difference is erractical [sic]. The fact of the drunkenness is admitted by the prosecution, but the [sic] Officer Kozlowski, the officer who has been a police officer for 18 years. He testified that the defendant was more than a little drunk. He was soused.
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> Again, this added to his -- the change in his personality, the change in his demeanor. I think that when you've considered all of the facts in this case and when you've considered the law that the judge will give you in a few minutes. I think you will be unable to find that my client entertained the requisite state of mind. That is a premeditated intent to kill . . . .

Defendant is correct that voluntary intoxication is not a defense. MCL 768.37 provides, in relevant part:

> (1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

The trial court recognized this and properly informed the jurors that "[i]t is not a defense that the defendant was under [ ] or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, controlled substance or a combination of them pertinent to Homicide Murder, First Degree, Premeditated, and, or Second Degree, Murder." Defense counsel did not object to that instruction.

Counsel testified during the *Ginther* hearing that he was aware that the law had abolished voluntary intoxication as a defense and that defendant's intoxication could only result in an acquittal if the jury accepted it as a defense even though it was instructed to the contrary. He testified that he viewed this as a "Hail Mary" defense, but that he did not believe a better defense was available, and he thought the argument might lead the jury to conclude that defendant did not have the requisite state of mind for first-degree murder regardless of the instruction. As noted above, defendant argues that his best defense would have been to argue provocation and request a voluntary manslaughter instruction. This may have been so, but as noted above, we agree with the trial court that this would not have led to a different outcome given the overwhelming evidence in the case, the nature of the alleged provocation and the time between the provocation and the killing. We do not believe that a reasonable jury after hearing the evidence in this case, could conclude (a) that the provocation would have caused a reasonable person to lose control; and (b) that there was no lapse of time during which a reasonable person would have controlled his passions. *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009). While defendant criticizes counsel for seeking a verdict based on nullification, the argument suggested by defendant would have similarly required jury nullification to be successful.

Lastly, defendant argues that counsel was deficient for failing to establish that the decedent was under the influence of narcotics, which could have been shown to have contributed to defendant's provocation. Defense counsel did not question Assistant Wayne County Medical Examiner Leigh Hlavaty regarding the presence of drugs in the decedent's body. Defense counsel was aware that the decedent's toxicology report reflected the presence of narcotics, but did not think this fact was helpful to defendant's case. Defense counsel's choice not to question

Hlavaty regarding the presence of narcotics in the decedent's system was a matter of reasonable trial strategy. *Rockey*, 237 Mich App at 76-77. We will not substitute our judgment for that of counsel regarding matters of trial strategy. *Payne*, 285 Mich App at 190. Therefore, defendant has failed to demonstrate that he was denied the effective assistance of counsel.

Affirmed.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro