STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2012
v OTTO HARRIS, Defendant-Appellant.	No. 304335 Genesee Circuit Court LC No. 10-027015-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v OTTO HARRIS, Defendant-Appellant.	No. 304336 Genesee Circuit Court LC No. 11-028166-FH

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In docket 304335, defendant Otto Harris appeals by right his jury convictions of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, and failure to stop at the scene of an accident that resulted in death, MCL 257.617(3). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent prison sentences of 330 to 500 months for second-degree murder, 330 to 500 months for each count of assault with intent to commit murder, and 172 to 300 months for failure to stop at the scene of an accident that resulted in death.

In docket 304336, defendant appeals by right his jury conviction of operating a motor vehicle under the influence (OUIL) causing death. MCL 257.625(4). The trial court sentenced defendant as a habitual offender to serve 172 to 300 months for that conviction. Because we conclude that there were no errors warranting relief in either appeal, we affirm in both.

Defendant's convictions stem from an incident where he drove his car at three pedestrians: Michael Burch, Heather Smith, and Tiffany Sanders. Defendant struck both Burch and Smith; Burch died from his injuries.

Defendant first argues that there was insufficient evidence to support his conviction for second-degree murder. Specifically, he argues that there was insufficient evidence to establish that he had the requisite malice. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

In order to convict defendant of second-degree murder, the prosecution had to prove that defendant caused a death and that he did so with malice and without justification or excuse. *Id.* at 84. A person acts with malice if he or she does the act with the intent to kill, with the intent to cause great bodily harm, or intends to do an act that is in wanton and willful disregard of the likelihood that the natural tendency of such an act is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice can also be inferred from evidence that shows that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *Roper*, 286 Mich App at 84. "[A]n actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citation omitted).

Smith testified that defendant became angry with Burch after he was unable to buy cocaine; defendant turned to Burch and threatened: "I can kill you, your family and your girl." The evidence showed that Burch, Smith and Sanders got out of defendant's car while stopped at a light and began to walk away. Smith and Sanders both heard an engine revving just before defendant drove his car into Smith and Burch. One bystander testified that defendant drove slowly at first, but then accelerated directly into Burch and Smith. Another witness testified that defendant sped up and hit Burch and Smith. An expert in accident reconstruction also testified that the acceleration marks made by defendant's car indicated that defendant accelerated in a straight line without braking. And an officer testified that defendant's car was not defective.

The evidence that defendant became angry with Burch, Smith and Sanders, is circumstantial evidence that he had a motive to attack them. Likewise, the evidence that he slowly drove his car out of the line of traffic and then accelerated directly at all three victims—without trying to brake—is evidence that he deliberately tried to run them down. Thus, there was evidence that minimally supported a finding that defendant intended to kill, intended to cause great bodily harm, or, at the very least, that he intentionally set in motion a force likely to cause death or great bodily harm. Consequently, there was sufficient evidence to establish the requisite malice.

Moreover, while evidence was presented at trial that defendant was drinking, "voluntary intoxication is not a defense to a second-degree murder." *People v Werner*, 254 Mich App 528, 533; 659 NW2d 688 (2002). Also, in a challenge to the sufficiency of the evidence, a reviewing court "will not resolve credibility issues anew on appeal," *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002); rather it must resolve "all conflicts in the evidence . . . in favor of the prosecution," *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Although defendant testified that he did not intend to harm Burch, his testimony was directly contradicted by the evidence that he threatened to kill Burch and accelerated his car right at Burch and Smith. And we must resolve this contradiction in favor of upholding the verdict.

Defendant also argues that the evidence that he was angry plainly mitigated his culpability to voluntary manslaughter. A person is guilty of voluntary manslaughter rather than murder if he or she killed in the heat of passion that was caused by an adequate provocation and without sufficient time to control his or her passions. *Roper*, 286 Mich App at 87. Defendant testified that he became angry with Sanders after she interjected her opinion about the cocaine. Defendant testified that he was also somewhat angry with Burch because Burch was going to charge a high price for the cocaine. However, the "provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason" and "case law has consistently held that the provocation must be adequate, namely, that which would cause a *reasonable person* to lose control." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). For this reason, "'[n]ot every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter.'" *Roper*, 286 Mich App at 89, quoting *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). And what constitutes reasonable provocation is generally a matter for the jury. *People v Tierney*, 266 Mich App 687, 715; 703 NW2d 204 (2005). A reasonable jury certainly could have concluded that Sanders' decision to offer an opinion about the cocaine and Burch's decision to charge defendant a higher price was not the type of provocation that would mitigate defendant's actions from second-degree murder to manslaughter.

In a pro se brief, defendant argues that he did not receive effective assistance from either his trial counsel or his appellate counsel. Specifically, he argues that his trial lawyer should have addressed mitigating factors to the intent element of murder and should have raised a defense of diminished capacity, intoxication, or insanity. He argues that his appellate lawyer should have raised a claim arguing that defendant's trial lawyer was ineffective for these same reasons and should have provided defendant with a copy of the trial transcripts. To establish either the ineffective assistance of trial or appellate counsel, defendant must show that his lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the deficient performance, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Because there was no evidentiary hearing on either claim, our review is limited to mistakes that are apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant claims that his trial lawyer should have challenged the intent element of murder with evidence that he was intoxicated, had a prior head injury, and had a history of depression. Yet, there was evidence of defendant's intoxication and prior head injury. Defendant testified that he was shot in the head in 1990 and that he has since suffered memory problems. Defendant also testified that he did not remember driving into Smith or Burch. Additionally, defendant testified extensively about the alcohol he consumed on the day at issue. Accordingly, this evidence was before the jury and a reasonable trial lawyer might have concluded that this evidence was sufficient.

Defendant's claim that his trial lawyer should have asserted various defenses is likewise meritless. Whether to present and argue a particular defense at trial are generally matters of strategy committed to the responsibility of the defendant's trial lawyer. See *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). As such, in order to prevail on this claim, defendant must show that his trial lawyer's decision not to pursue these defenses fell below an objective standard of reasonableness and that there is a reasonable probability that, had his trial lawyer presented the defenses, the outcome of his trial would have been different. *Uphaus*, 278 Mich App at 185.

The diminished capacity defense no longer exists under Michigan law; a defendant who wishes to negate the intent element through proof of deficient mental capacity must instead demonstrate that he or she was insane at the time of the offense. See *People v Yost*, 278 Mich App 341, 354-355; 749 NW2d 753 (2008), citing *People v Carpenter*, 464 Mich 223, 232, 237; 627 NW2d 276 (2001). Similarly, "voluntary intoxication is not a defense to a second-degree murder." *Werner*, 254 Mich App at 533. Therefore, defendant's trial lawyer could not have raised these defenses and, accordingly, cannot be faulted for failing to do so. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

In order to assert an insanity defense, defendant would have to establish that he lacked the "'substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law.'" *People v Lacalamita*, 286 Mich App 467, 470; 780 NW2d 311 (2009), quoting *Carpenter*, 464 Mich at 230-231. Even assuming that defendant had a history of depression, there was no evidence that defendant was suffering from depression on the day at issue or that the depression rendered him incapable of appreciating the nature of the wrongfulness of his conduct or of conforming his conduct to the requirements of the law. Further, while defendant alleges that he suffered prejudice because he was not promptly examined by a psychologist, he offers no evidence that any expert "would have testified favorably if called by the defense" or that such testimony would have altered the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Therefore, this claim does not warrant relief.

Defendant's failure to establish that his trial lawyer was ineffective also forecloses his claim that his appellate lawyer's failure to raise the same claims constituted the ineffective assistance of appellate counsel; in order to prevail on this claim of error, defendant must show that, had his appellate lawyer raised these claims, there is a reasonable probability that the outcome of his appeal would have been different. *Uphaus*, 278 Mich App at 186. Because these claims would not have warranted appellate relief, defendant cannot establish that the failure to bring these claims prejudiced his appeal. *Id.* at 187.

Defendant also claims that he was denied the effective assistance of appellate counsel when his appellate counsel failed to provide him with the trial transcripts. Defendant's appellate lawyer ordered and, presumably, reviewed the trial transcripts; and defendant has cited no authority for the proposition that an appellate lawyer must always provided a copy to his or her client. Moreover, defendant has failed to specify how receiving the transcripts would have altered the outcome of the appeal. Consequently, he has not established that his appellate lawyer's decision prejudiced his appeal. *Id.*

There were no errors warranting relief.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra