STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANGELO ROCHELLE MCMULLAN, Defendant-Appellant.	FOR PUBLICATION June 2, 2009 9:00 a.m. No. 281844 Genesee Circuit Court LC No. 01-008582-FC Advance Sheets Version

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

SAAD, C.J.

A jury convicted defendant of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 30 to 75 years in prison for the second-degree murder conviction, 5 to 15 years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. Defendant appeals and, for the reasons set forth below, we affirm.[1]

I. Jury Instruction

Defendant claims the trial court erred when it refused to give the jury an involuntary manslaughter instruction. This Court reviews de novo questions of law arising from jury instructions. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). To warrant reversal of a conviction, the defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

[1] Although defendant initially failed to file a timely claim of appeal, the United States District Court for the Eastern District of Michigan granted habeas relief to defendant and ordered the state of Michigan to reinstate his appeal as of right in this Court. *McMullan v Jones*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, entered August 30, 2006 (Docket No. 05-70807-DT), slip op at 11.

A homicide committed with malice is murder. *People v Mendoza*, 468 Mich 527, 534-536; 664 NW2d 685 (2003). In contrast, the unintentional killing of another, "'committed with a lesser mens rea of gross negligence or an intent to injure, and not malice," is common-law involuntary manslaughter. *Gillis, supra* at 138, quoting *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004). Common-law involuntary manslaughter is a necessarily included lesser offense of murder. *Mendoza*, *supra* at 540-542. If a defendant is charged with murder, the trial court should instruct the jury on common-law involuntary manslaughter, but only if the instruction is supported by a rational view of the evidence. *Id.* at 541. Unlike the dissent, we do not believe that a rational view of the evidence in this case supports an instruction for involuntary manslaughter.

Here, were we to agree that one of the bases for the trial court's refusal to give the instruction was incorrect—that defendant committed a felony by stealing the victim's money after the shooting—a rational view of the evidence nonetheless does not support an instruction for involuntary manslaughter. To find involuntary manslaughter, a defendant must not act with malice. *Gillis, supra* at 138. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke,* 457 Mich 442, 464; 579 NW2d 868 (1998). "[M]alice is implied when the circumstances attending the killing demonstrate an abandoned and malignant heart . . . ." *Id.* at 467. It can also "be inferred from the use of a deadly weapon." *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

Here, the evidence supports a finding of malice and not a lesser *mens rea* of gross negligence, as defendant claims. Defendant was angry at the victim over payment for a cocaine deal and had a fistfight in the apartment complex parking lot. The fight ended and the victim got into his station wagon. Defendant then repeatedly demanded that his wife give him his loaded revolver. When defendant's wife refused to give him the gun, defendant grabbed it from her and returned to and escalated the altercation with the victim. He approached the victim's car and pushed the door to prevent the victim from getting out of his vehicle. After the victim fell back into his seat, defendant pointed the gun at the victim, within one foot of his chest. Defendant cocked back the hammer of the revolver, which was the only way the gun could fire. Then, defendant pulled the trigger, shooting the victim at close range in his chest. Thereafter, defendant rifled through the critically injured victim's pockets and took his money. These facts support a finding of malice and preclude a finding of involuntary manslaughter.

The only evidence suggesting that defendant did not commit this homicide with malice is his own testimony that he did not intend to kill the victim, that he assisted in taking the victim to the hospital, and that he displayed remorse. This does not constitute the kind of substantial evidence necessary to support a lesser offense instruction, *People v Silver*, 466 Mich 386, 393; 646 NW2d 150 (2002), and the facts certainly do not "rationally fit within the legal purview of manslaughter . . . ." *Holtschlag, supra* at 16 n 8.[2] Again, in light of evidence that defendant

[2] We acknowledge that defendant claims not to remember cocking the hammer or pulling the trigger and that he denies searching the victim's pockets for money, but the gun could not have discharged without the deliberate act of pulling back the hammer and he acknowledged that
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demanded a loaded weapon from his wife after the physical altercation concluded, returned to the victim and maintained a dominant position over him by physically forcing the victim back into the vehicle, pointed the gun close to the victim's chest, cocked the hammer, pulled the trigger, and stole the victim's money, no rational jury could conclude that defendant acted without malice. Defendant's alleged display of remorse does not alter this conclusion. Once defendant saw the gruesome result of his act, he may have regretted his conduct, but this does not alter the fact that his actions denote malice. To rule otherwise opens the door to ex post facto rationalizations of cold-blooded murder, like the one defendant committed here. The trial court correctly refused to give the jury an instruction on involuntary manslaughter.

II. Assistance of Counsel

Defendant contends that his attorney was ineffective because he did not know that one of the prosecution witnesses, Gregory McDowell, may have received lenience in anticipation of his testimony against defendant and counsel failed to cross-examine McDowell about his plea agreement.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485. Effective assistance is strongly presumed, and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.* at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show (1) that his attorney's performance fell below an objective standard of reasonableness and (2) that the performance so prejudiced him that he was deprived of a fair trial. *Grant, supra* at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

There is no evidence that, at the time McDowell testified, a plea agreement existed. McDowell had been charged with possession of cocaine, but did not enter a guilty plea until two days later. Defense counsel's performance cannot fall below an objective standard of reasonableness for failing to cross-examine the witness regarding a nonexistent agreement.

Defendant also claims that defense counsel should have anticipated McDowell's plea agreement because (1) McDowell testified for the prosecution, but was also facing charges, and (2) McDowell was granted supervised release even though he failed to appear at his arraignment. Were we to agree, counsel's performance would not have so prejudice defendant that he was deprived of a fair trial. *Grant, supra* at 485-486. McDowell's testimony was the same as defendant's except with regard to whether defendant searched the victim's pockets after the

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firing a revolver at a person's chest is likely to cause serious injury or death. Moreover, a witness testified that defendant indeed searched the victim's pockets immediately after shooting him.

shooting. Given the evidence relating to the actual shooting of the victim, there was clearly overwhelming evidence to convict defendant of second-degree murder on the basis of defendant's testimony alone.

The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). The victim died as a result of a gunshot fired by defendant. Defendant admitted the fistfight and explained that the victim's failure to pay for the cocaine would have disrupted defendant's ability to support his drug habit.

Notwithstanding that the evidence clearly supports a conviction of second-degree murder, defendant claims that, absent McDowell's testimony regarding the search of the victim's pockets, the jury would have been more likely to convict defendant of voluntary manslaughter. The elements of voluntary manslaughter are: "(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Time lapsed after the fistfight stopped and the victim retreated to his car. Meanwhile, defendant repeatedly asked his wife to give him the revolver and she refused. Thereafter, defendant approached his wife and "snatched" the revolver from her. Given this lapse of time, during which a reasonable person could have controlled his passions, the jury could not have found defendant guilty of voluntary manslaughter beyond a reasonable doubt. Thus, defendant fails to show a reasonable probability that the outcome would have been different but for the defense counsel's failure to anticipate McDowell's plea agreement and to cross-examine McDowell accordingly. *Grant, supra* at 486.

III. Prosecutorial Misconduct

Defendant also asserts that, if his ineffective assistance of counsel claim fails, the prosecutor engaged in misconduct by failing to disclose McDowell's plea agreement.[3]

Under MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony. Similarly, pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the prosecutor must disclose any information that would materially affect the credibility of his witnesses. See *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). To establish a *Brady* violation, a defendant must prove

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that

[3] This Court reviews preserved claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair or impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.* at 281-282.]

Were we to decide that the prosecutor should have disclosed information about McDowell's anticipated plea agreement, defendant would fail to satisfy the fourth prong of the *Brady* test. Defendant has not shown that a reasonable probability exists that the outcome of the proceedings would have been different had the prosecutor disclosed evidence of a plea agreement or expectations for lenience in anticipation of an agreement. *Lester, supra* at 282. Again, regardless of McDowell's testimony, there was substantial evidence for the jury to have rejected a voluntary manslaughter instruction and convict defendant of second-degree murder. Furthermore, "a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Lester*, *supra* at 283. Evidence of the plea agreement or expectations for lenience would only have served as an additional basis to impeach McDowell, who had already been impeached by discrepancies between his preliminary examination testimony and his trial testimony. In light of defendant's failure to prove this element of the *Brady* test, we need not remand for an evidentiary hearing to address whether the prosecutor fulfilled his duty to disclose.

Affirmed.

Hoekstra, J., concurred.

/s/ Henry William Saad
/s/ Joel P. Hoekstra