

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DAVID BRYANT,

Defendant-Appellant.

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UNPUBLISHED

December 21, 1999

No. 210019

Recorder's Court

LC No. 97-501791

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment for the felony-firearm conviction and a consecutive term of eighteen to thirty years' imprisonment for the second-degree murder conviction. Defendant now appeals as of right. We affirm.

On February 15, 1997, defendant was present at his uncle's house in Lincoln Park, Michigan, with his brother, Stanley "Junior" Bryant, who is the victim in this case. Defendant's uncle, Richard Paisano, defendant's half-brother, Eric Paisano, and a friend were also present at the house. At approximately 1:00 a.m., while defendant and the victim were alone in the kitchen, the two began arguing. Richard Paisano overheard the victim telling defendant that he did not like the way defendant was talking to their mother. The victim threatened to "kick [defendant's] ass" if he continued the same conduct. Defendant responded, "No you won't, cause I got a gun and I'll kill you." Thereafter, the victim punched defendant once in the face. According to Richard Paisano, as the victim was preparing to strike defendant again, defendant pulled out a gun and shot the victim several times from a distance of approximately three feet. The victim fell to the floor and defendant shot at least twice more into the wall above the victim's head. Defendant then walked to the door and matter-of-factly stated, "that'll teach you to fuck with me nigger." The victim was transported to the hospital where he died as a result of three gunshot wounds to his chest. Defendant was arrested in Missouri in April 1997, and was extradited to Michigan on May 8, 1997. On May 9, 1997, defendant gave a statement to the Lincoln Park Police. Defendant stated that he and the victim argued over a cell phone on the night in question

and that he shot the victim “a couple of times.” Defendant specified that he shot the victim once in the heart because the victim “was still holding on.”

On appeal, defendant first argues that the trial court erred in rejecting his guilty plea without offering him proper assistance in making a legally sufficient plea. We disagree. A trial court has discretion to accept or reject a criminal defendant’s guilty plea. *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). MCR 6.302(A) provides that a trial court may not accept a guilty plea “unless it is convinced that the plea is understanding, voluntary, and accurate.” In regard to establishing an accurate plea, the rule provides:

If the defendant pleads guilty, the court, by questioning defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading. [MCR 6.302(C); see *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997).]

Here, during a break in jury voir dire, defendant’s counsel informed the trial court that defendant wished to plead guilty to the charged offenses. The trial court questioned defendant to establish that defendant was asserting a voluntary and understanding plea. See MCR 6.302(B) and (C). Thereafter, defendant was questioned by the prosecution, defendant’s counsel and the trial court regarding the circumstances surrounding the charged offenses. Defendant acknowledged that he shot the victim several times, knowing that the shots were likely to cause death or very grave injuries. However, defendant clearly indicated that he was not trying to kill the victim. He stated that the victim was on top of him, punching him and that he felt, at the time of the shooting, the victim was going to kill him. Defendant stated that he fired the gun at the victim in an effort to get the victim off him.

The elements of second-degree murder include: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Given defendant’s testimony that he fired the shots in an effort to get the victim off him, there was no factual basis for a finding that defendant acted without justification or excuse. Therefore, the trial court did not err in rejecting defendant’s guilty plea without further aiding defendant in making a legally sufficient plea. Defendant offered his sworn testimony regarding the events and the trial court did not abuse its discretion in relying on that testimony for purposes of analyzing the plea.

Defendant next argues that he was denied due process when the prosecution referred to him as a “killer” during its opening statement. We disagree. Defendant failed to object to the prosecution’s alleged improper remarks below and, therefore, this claim was not preserved. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review unpreserved instances of alleged improper prosecutorial conduct if a cautionary instruction could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *Id.*; *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

The prosecution began its opening statement as follows:

Good morning everybody. As you all know by now that young man sitting over there at the defense table is Larry Bryant. And what Larry Bryant is, is a killer. He is a ruthless, cold blooded, heartless and unremorseful killer.

Defendant claims that those remarks unfairly contaminated the atmosphere at trial, demanding reversal of his conviction. Had defendant objected to the remarks, the alleged error could have been cured by an instruction to the jury that argument by the attorneys is not evidence of defendant's guilt. Therefore, we conclude that a miscarriage of justice will not result from our failure to review this specific claim. *Stanaway, supra* at 687; *Reid, supra* at 466.

Defendant also argues that his trial counsel's failure to assist him in offering a legally sufficient guilty plea and failure to object to the prosecution's remarks during its opening statement constituted ineffective assistance of counsel. We disagree. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674; *Stanaway, supra* at 687-688; *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant did not object to his counsel's performance below and establish a record pertaining to his allegations of ineffective assistance. Consequently, we review defendant's claims of ineffective assistance to the extent that alleged deficiencies in defendant's trial counsel's performance are apparent from the lower court record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997); *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). Defendant's counsel was given the opportunity to question defendant during the plea proceeding and elicited testimony from defendant regarding the number of times defendant shot the victim and testimony which clarified that defendant did not believe the victim had a gun. It is evident from those questions that defendant's counsel was attempting to demonstrate that, despite defendant's prior testimony that he fired the shots to get the victim off him, the number of shots defendant fired and the fact that the victim was unarmed suggested defendant was not truly claiming to have acted in self-defense. Consequently, it was not objectively unreasonable for defendant's counsel to fail to request a recess to consult with defendant regarding the subject of his testimony. *Stanaway, supra* at 687-688; *Poole, supra* at 717. Even had defendant consulted with his counsel, the record does not establish that defendant would have retreated from his claims of self-defense, or insisted on tendering a plea, or that any changed testimony would have convinced the trial court to accept the plea. *Stanaway, supra* at 687-688; *Poole, supra* at 717.

Additionally, defendant's counsel's failure to object to the prosecution's opening statement did not constitute ineffective assistance. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.

*People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The prosecution's remarks during its opening statement were supported by compelling evidence at trial. Moreover, the outcome of the trial would not have been different had defendant's counsel objected to the prosecution's opening statement because an instruction could have cured the alleged error. Accordingly, defendant has failed to overcome the heavy presumption against a determination of ineffective assistance of counsel. *Stanaway, supra* at 687; *People v Rockey*, 237 Mich App 74, 77; \_\_\_ NW2d \_\_\_ (1999).

Defendant finally argues that the trial court erred in failing to instruct the jury regarding the lesser offense of involuntary manslaughter. We disagree. Defendant did not specifically request an involuntary manslaughter instruction and did not object below to the jury instructions. Therefore, we need not address the alleged error unless necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v VanDorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). Here, there was no evidence supporting an instruction on involuntary manslaughter. "Involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." *People v Clark*, 453 Mich 572, 578; 566 NW2d 820 (1996). By all indications, defendant intentionally fired the gun at the victim several times, even after the victim had fallen to the floor. No evidence suggested that the victim's death resulted from a non-felonious or negligent act. Giving an instruction on a lesser offense that has no evidentiary basis detracts from the rationality and reliability of the fact-finding process. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Accordingly, our refusal to review defendant's claim does not result in manifest injustice.

Affirmed.

/s/ Helene N. White  
/s/ David H. Sawyer  
/s/ Richard Allen Griffin