STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2002
v	No. 228082 Washtenaw Circuit Court
SATISH MARISWAMY, Defendant-Appellant.	LC No. 99-012982-FC

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted after jury trial of first-degree premeditated murder, MCL 750.316(a), and was sentenced to life in prison. Defendant appeals by right. We affirm.

Defendant argues that his trial counsel erred by not moving to suppress his statement as the fruit of an illegal arrest. "[A] confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession, so that the confession is sufficiently an act of free will to purge the primary taint." *Taylor v Alabama*, 457 US 687, 690; 102 S Ct 2664; 73 L Ed 2d 314 (1982), quoting *Brown v Illinois*, 422 US 590, 602; 95 S Ct 2254; 45 L Ed 2d 416 (1975), quoting *Wong Sun v United States*, 371 US 471, 486; 83 S Ct 407; 9 L Ed 2d 441 (1963). See also *People v Mallory*, 421 Mich 229, 243 n 8; 365 NW2d 673 (1984).

However, because defendant did not argue below that he was illegally arrested, defendant's underlying claim is reviewed for plain error affecting substantial rights. *People v McCrady*, 244 Mich App 27, 29; 624 NW2d 761 (2000). Further, defendant has the burden to demonstrate that the plain error resulted in the conviction of an innocent person or that his statement was involuntary and its use compromised the integrity of the judicial system. *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999); *People v Ray*, 431 Mich 260, 270; 430 NW2d 626 (1988). Moreover, under the two-pronged test for establishing ineffective assistance of counsel, the defendant has the burden of overcoming the presumption that counsel was effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Strickland*, *supra*, 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the deficiency must have been so prejudicial that the defendant was deprived of a fair

trial. *Strickland, supra,* 687-688; *Pickens, supra,* 309. On this latter point, defendant must show that there is a reasonable probability that but for counsel's unprofessional error(s), the trial outcome would have been different. *People v Toma,* 462 Mich 281, 302-303; 613 NW2d 694 (2000).

The Fourth Amendment prohibits unreasonable seizures of persons, and an arrest based on less than probable cause is illegal, *People v Shabaz,* 424 Mich 42, 52; 378 NW2d 451 (1985), unless the seizure of the person is only a brief detention based on reasonable suspicion, *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). A person is seized within the meaning of the Fourth Amendment if, in view of all of the facts and circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Michigan v Chesternut,* 486 US 567, 573; 108 S Ct 1975, 1981; 100 L Ed 2d 565 (1988); *People v Coomer,* 245 Mich App 206, 219; 627 NW2d 612 (2001). As explained by the Supreme Court:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. [*Chesternut, supra,* 573-574.]

Moreover, the test to determine when a person has been "seized" within the Fourth Amendment is an objective one based on the reasonable man standard. *Chesternut, supra,* 574. Thus, the subjective view of the situation by the police, or the subjective view of the situation by the person being interrogated, does not determine whether a person has been seized or whether the seizure, if one occurred, was lawfully based upon probable cause. *Stansbury v California,* 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994); *Coomer, supra,* 220.

Not every encounter between the police and a citizen is a seizure. *People v Shankle,* 227 Mich App 690, 693; 577 NW2d 471 (1998).

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. [*Chesternut, supra,* 573, quoting *Terry v Ohio, supra,* 19 n 16.]

This Court addressed the issue of when a "seizure" occurs in *People v Frohriep,* 247 Mich App 692, 700; 637 NW2d 562 (2001), and found no constitutional prohibition to police practice of "knock and talk," opining,

> In order for any police procedure to have constitutional search and seizure implications, a search or seizure must have taken place. US Const, Am IV; Const 1963, art 1, § 11; *United States v Mendenhall,* 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion of Stewart, J.); see also *Florida v Royer,* 460 US 491, 498; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion). As the Sixth Circuit Court of Appeals explained, "[t]he safeguards of the Constitution, with

> respect to police/citizen contact, will vest only after the citizen has been seized." *United States v Richardson*, 949 F2d 851, 855 (CA 6, 1991). The Sixth Circuit Court of Appeals agreed that "voluntary cooperation of a citizen in response to non-coercive questioning [raises no constitutional issues.]" *Id.*, quoting *United States v Morgan*, 936 F2d 1561, 1566 (CA 10, 1991). [*Id*., 247 Mich App 699-700.]

Defendant relies primarily upon Detective Sheikh's testimony that in his mind defendant was not free to leave after his initial statement. However, Sheikh never communicated this to defendant, nor did any other police officer tell defendant he was not free to leave. Because it was not communicated to defendant, Sheikh's thought process is irrelevant to the determination of whether defendant was seized within the Fourth Amendment. *Stansbury, supra*, 323; *Coomer, supra*, 220.

A review of the totality of circumstances of the present case demonstrates that at all relevant times defendant was voluntarily cooperating with the police and there is no objective basis to conclude defendant submitted to questioning based on physical force or show of authority by the police. It was undisputed that defendant went to the police station, not at the request of the police, but because he wanted to give the police a statement. Although Sheikh told defendant he did not believe that defendant was being completely truthful, advised him of his *Miranda*[1] rights and asked defendant if he would take a polygraph test, the clear inference from the evidence was that defendant wanted to make a statement to the police to explain why they might find physical evidence linking him to the crime scene.

Sheikh also testified that defendant agreed to take the polygraph after making one or more telephone calls and that defendant wanted to cooperate. Defendant admitted that Sheikh treated him well, even compassionately, and further testified that Sheikh and his partner, Detective Avery, did not threaten him, and provided him with food and a cigarette when requested. Sheikh further testified that neither he nor Detective Fitzpatrick, who conducted the examination, was in uniform, nor did they display weapons and neither told defendant he could not leave. Furthermore, defendant never asked to leave and testified regarding the polygraph operator as follows:

> *Q*. Did you tell Detective Fitzpatrick that you'd like to leave at that point?
>
> *A*. No, sir.
>
> *Q*. Had he handcuffed you at that point?
>
> *A*. No, sir.
>
> *Q*. Did he restrain you, make you stay there?
>
> *A*. No, sir.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Thus, the record does not support an objective basis to conclude, in view of all of the facts and circumstances surrounding the incident, that a reasonable person would have believed that he was not free to leave. *Chesternut, supra*, 573; *Shankle, supra*, 693. Without a seizure, there can be no Fourth Amendment violation. *Frohriep, supra*, 699. Therefore, defendant's confession cannot be the fruit of the poisonous tree if the tree is not poisonous. *Colorado v Spring*, 479 US 564, 571-572; 107 S Ct 851; 93 L Ed 2d 954 (1987). Trial counsel cannot be found ineffective for failing to raise a futile basis to suppress defendant's statement. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1999).

Moreover, we agree with the prosecutor that Detective Sheikh had probable cause to arrest defendant after he made his initial statement. In his first statement to Sheikh that morning, defendant had admitted being the first person to find the victim's body, admitted physically striking the victim (to rouse him) and getting blood on his hands, and it was also clear he had concealed these facts from the police because he had given a statement on the night of the murder containing no significant information. Regardless of when defendant said he had taken things from the victim's apartment to make it look like a burglary, the above admissions, together with defendant's demeanor that included frequent crying, and according to Sheikh, being more remorseful than an innocent person would be, were sufficient to warrant " 'a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed [ ] an offense.' " *Shabaz, supra*, 58, quoting *Michigan v DeFillippo*, 443 US 31, 37; 99 S Ct 2627, 2632; 61 L Ed 2d 343 (1979).

In essence, defendant himself acknowledged that the facts he admitted might cause fair-minded persons of average intelligence to suspect him of killing the victim and that was why he claimed he had panicked and attempted to conceal his presence at the crime scene. "Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony." *People v Richardson*, 204 Mich App 71, 79; 514 NW2d 503 (1994), quoting *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991). Because the police had probable cause to arrest defendant, the claim that defendant's later statements were the fruit of the poisonous tree is without merit. *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Defendant's claim of ineffective assistance of counsel also fails because counsel is not required to advocate positions that lack merit. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Furthermore, even if defendant were illegally detained, the suppression of his voluntary statements given after several *Miranda* warnings would not be warranted. The trial court's factual findings that defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights, and that his statements were voluntary, were not clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *McCrady, supra*, 29. Such a finding is a prerequisite to admissibility of a statement made following an illegal arrest. *Taylor, supra*, 690. If there is a break in the causal connection between the illegal arrest and the confession so that it is sufficiently the free act of the suspect purged of the taint of illegality, the statement may be admitted. *Id.* "It is only when an 'unlawful detention has been employed as a tool to directly procure any type of evidence from a detainee' that the evidence is suppressed under the exclusionary rule." *People v Kelly*, 231 Mich App 627; 588 NW2d 480 (1998), quoting *Mallory, supra*, 243 n 8.

Relevant factors in determining whether there is a causal link between the illegal arrest and a suspect's confession that requires its suppression are: (1) the length of time between the illegal arrest and the confession, (2) the flagrancy of official misconduct, (3) any intervening circumstances, and (4) any circumstances antecedent to the arrest. *People v Spinks*, 206 Mich App 488, 496; 522 NW2d 875 (1994). Here, the alleged misconduct of the police was not flagrant. More importantly, the record demonstrates that defendant's statements were self-motivated and not the product of coercive illegal detention because defendant repeatedly testified and told the police he wanted to make a statement. Defendant's statements were therefore properly admitted. *Id.,* 497; *People v Malach***,** 202 Mich App 266, 274-276; 507 NW2d 834 (1993).

In summary, the totality of the circumstances of the present case do not establish that the police "seized" defendant within the meaning of the Fourth Amendment where defendant for his own reasons appeared at the police station and continued answering questions for his own reasons even after repeated advice of *Miranda* warnings. Moreover, the police had probable cause to arrest defendant after his first uncontested admissions, and even if they did not, his subsequent statements were his own voluntary acts and not the exploitive product of an illegal arrest. Therefore, defendant has failed to prove an outcome determinative error of trial counsel. *Toma, supra,* 302-303; *Fike, supra,* 182.

Defendant next argues that he was deprived a fair trial and effective assistance of counsel when defense counsel waived the reading of an instruction on self-defense, did not request an instruction on imperfect self-defense and neglected to ask witnesses questions concerning wounds sustained by defendant or whether the crime scene indicated a struggle had occurred. We disagree. Defendant has failed to meet his heavy burden of overcoming the presumption that his trial counsel provided effective assistance. *People v Carbin*, 463 Mich 590, 599; 523 NW2d 884 (2001); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, defendant has failed to establish prejudice (a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Toma, supra,* 302-303.

The killing of another person in self-defense is justifiable homicide, a complete defense to murder. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). The requirements for lawful self-defense are that: (1) the defendant honestly and reasonably believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary (the defendant used only the amount of force necessary to defend himself); and (4) the defendant was not the initial aggressor. *Id.,* 509 n 23; *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). See also CJI2d 7.15 and CJI2d 7.18. A corollary to the requirement of immediate necessity is that the law imposes a duty to retreat if not in one's own home and if retreat can be safely accomplished. CJI2d 7.16; *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

When defendant's account of the offense is viewed in the light most favorable to him (because the prosecution has the burden to disprove self-defense), the victim attacked defendant with a wrench and thus was the first aggressor. While it may have been reasonable to consider such an assault potentially lethal, defendant claimed to have quickly disarmed the victim and turned the tables by striking the victim with the same wrench and chasing him around the

apartment. The only other weapon that defendant claimed the victim used was a computer cable, which defendant avoided and also quickly turned against the victim. Thus, by his own admissions, defendant had disarmed the victim, making deadly self-defense unnecessary. Further, retreat was readily available to defendant, if not at the point when defendant was chasing the victim around the apartment, then clearly when the victim was rendered senseless, either by wrench blows or by strangulation. Defendant's argument that trial counsel denied defendant a substantial defense by abandoning a claim of self-defense is utterly without merit. Counsel is not required to advocate a meritless position. *Snider*, *supra*, 425.

Moreover, counsel is not ineffective by admitting defendant's guilt to a lesser offense in the hope of raising reasonable doubt about a greater charge. *People v Emerson (After Remand)*, 203 Mich App 345, 348-349; 512 NW2d 3 (1994). This Court will not second-guess defense counsel's legitimate trial strategy. *Id.*; *People v Wise*, 134 Mich App 82, 97-98; 351 NW2d 255 (1984). Defendant's claim that counsel failed to pursue a substantial defense is unsupported.

Further, trial counsel's decisions to call (or not call) witnesses and the manner in which to question witnesses are presumed to be matters of trial strategy. *Rockey, supra*, 76. Counsel pursued a reasonable trial strategy by not emphasizing injuries that defendant received because the only injury defendant claimed the victim inflicted was to his head (with the wrench), which left a barely perceptible mark. Rather than being seen as "defensive wounds," a rational jury could have concluded that the victim inflicted defendant's injuries as he unsuccessfully fought for his life. For the same reason, it was reasonable to not emphasize evidence that a struggle occurred in the apartment. Other counsel may have tried this case differently, but this Court will not second-guess trial counsel concerning trial strategy with the aid of hindsight or on the basis that the strategy was unsuccessful. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Finally, defendant's argument that trial counsel erred by not requesting an instruction on "imperfect self-defense" fails because Michigan does not recognize the doctrine to excuse excessive force or unreasonable belief in the danger. This Court has consistently limited application of the doctrine to situations where the defendant would be able to assert self-defense but for his actions as the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992); *People v Amos*, 163 Mich App 50, 56-57; 414 NW2d 147 (1987); *Deason*, *supra*, 32; *People v Vicuna*, 141 Mich App 486, 493; 367 NW2d 887 (1985). Also, our Supreme Court has not recognized "imperfect self-defense" as a viable defense in Michigan. *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999). Because defendant claimed that the victim was the first aggressor, defense counsel did not err by failing to argue or request a jury instruction on an unrecognized legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

For the same reasons, the trial court fulfilled its duty to adequately instruct the jury on the law applicable to the case and the theories of the parties that were supported by evidence. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996).

Defendant next argues that the trial court erred by not suppressing defendant's confession because his request for counsel was not honored and because it was not voluntary. We disagree. Whether defendant's statement was knowing, intelligent, and voluntary is a question of law,

which the court must determine based on the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *Snider*, *supra*, 416. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination, *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998), and will affirm unless left with a definite and firm conviction that a mistake was made, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Likewise, whether defendant voluntarily, knowingly and intelligently waived his rights to silence and counsel is determined by de novo review of the entire record, but factual findings of the trial court will not be disturbed absent clear error. *Daoud*, *supra*, 629.

Whether a waiver is "voluntary" depends on the absence of police coercion, *Daoud*, *supra*, 635, and in this case there was no evidence of coercion. Defendant's waiver was "knowing" and "intelligent" if defendant was aware of his available options, but he need not comprehend the ramifications of exercising or waiving his rights. *Id.*, 636.

> "To establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." [*Daoud*, *supra*, 637, quoting *Cheatham*, *supra*, 29.]

If after waiver, however, defendant clearly invokes his right to counsel during custodial interrogation, questioning must stop until defendant has counsel present or unless defendant initiates further communication with the police. *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880, 1884-1885; 68 L Ed 2d 378 (1981); *People v Paintman*, 412 Mich 518, 529; 315 NW2d 418 (1982). However, an ambiguous statement regarding counsel does not require the police to stop their interrogation of defendant or to clarify whether the defendant wants counsel. *Davis v United States*, 512 US 452; 114 S Ct 2350; 129 L Ed 2d 362, 371 (1994); *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001).

In the present case, whether defendant invoked his right to an attorney under the Fifth Amendment was a question of fact the trial court was required to determine at the motion to suppress. The credibility of witnesses is a key factor in finding facts that are contested. "Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." *Daoud*, *supra*, 629. See also *People v Bender*, 208 Mich App 221, 227; 527 NW2d 66 (1994), where this Court wrote, "However, this Court gives deference to the trial court's superior ability to judge the credibility of the witnesses, and will not reverse the trial court's factual findings unless they are clearly erroneous." Here, the trial court resolved conflicting testimony and expressly found that defendant had not communicated a desire to have a lawyer present and therefore found as a fact that defendant had not invoked his right to counsel. The trial court's factual finding is not clearly erroneous, nor does an independent review of the record create a definite and firm conviction that a mistake has been made that defendant's statements were voluntary. *Daoud*, *supra*, 629; *Sexton (After Remand)*, *supra*, 752.

Defendant next argues that his confession should have been suppressed because his Sixth Amendment right to counsel was violated. We disagree. Whether the Sixth Amendment right to counsel is implicated by the facts of this case is a question of law we review de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). Because this issue was not preserved, the

record is reviewed for plain error effecting substantial rights. *Carines, supra,* 763; *McCrady, supra,* 29.

The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions, and is applied to the states through the Fourteenth Amendment right to due process. *People v Marsack,* 231 Mich App 364, 372-373; 586 NW2d 234 (1998); *People v Riggs,* 223 Mich App 662, 676; 568 NW2d 101 (1997). The Sixth Amendment right to counsel attaches only to criminal prosecutions at the time judicial process is initiated by a formal charge, a preliminary hearing, an indictment, an information or an arraignment, and extends to every critical stage of the proceeding. *Moore v Illinois,* 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977), quoting *Kirby v Illinois,* 406 US 682, 689; 92 S Ct 1877; 32 L Ed 2d 411 (1972) (plurality opinion); *People v Anderson (After Remand),* 446 Mich 392, 402; 521 NW2d 538 (1994). Similarly, the right to counsel under Const 1963, art 1, § 20, attaches only at or after the initiation of adversarial judicial proceedings. *People v Winters,* 225 Mich App 718, 723; 571 NW2d 764 (1997).

Even if defendant was "under arrest" at the time he made his statements to the police, the Sixth Amendment right to counsel had not yet attached. In *United States v Gouveia,* 467 US 180; 104 S Ct 2292; 81 L Ed 2d 146 (1984), the United States Supreme Court declined to extend the Sixth Amendment right to counsel to prison inmates held in administrative segregation pending a homicide investigation. The reasoning of the Court indicates that the Sixth Amendment would not extend to the period between an arrest and arraignment and the Court noted, "we have never held that the right to counsel attaches at the time of arrest." *Id.,* 190.

Moreover, even if the Sixth Amendment right to counsel attached before arraignment, defendant must still assert the right to enjoy its protection. *Patterson v Illinois,* 487 US 285, 290-291; 108 S Ct 2389; 101 L Ed 2d 261 (1998); *Anderson (After Remand), supra,* 402. Furthermore, advice of rights under *Miranda* and a valid waiver is also sufficient to apprise defendant of his Sixth Amendment rights and the consequences of waiver of those rights. *Patterson, supra,* 292-294, 300; *People v McElhaney,* 215 Mich App 269, 276-277; 545 NW2d 18 (1996). Thus, a waiver of *Miranda* rights can constitute a knowing and intelligent waiver of counsel under both the Fifth Amendment and Sixth Amendment. *Patterson, supra*; *McElhaney, supra*. Whether defendant invoked his right to an attorney, under either the Sixth Amendment or the Fifth Amendment, was a question of fact the trial court was required to determine at the motion to suppress. In this regard, as discussed above, the trial court did not clearly err. *Daoud, supra,* 629; *Sexton (After Remand*), *supra,* 752.

Defendant also argues that he was denied his constitutional right to testify at his trial when counsel failed to advise him of the right and waived it on his behalf. Defendant further claims his right to testify can only be waived after advice of his right and waiver on the record. We disagree. It should also be noted that this Court denied defendant's motion to remand for a hearing pursuant to *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973), by order dated February 9, 2001. Therefore, appellate review is limited to the existing record. *People v Sabin (On Second Remand),* 242 Mich App 656, 659; 620 NW2d 19 (2000). An alleged violation of a defendant's right to testify is a question of law subject to de novo review on appeal. *Sierb, supra,* 522.

The right of a criminal defendant to testify at his own trial is relatively recent, only recognized by statutes eliminating interest in the outcome of the litigation as a disqualification to being a witness in a case. *Nix v Whiteside*, 475 US 157, 164; 106 S Ct 988; 89 L Ed 2d 123 (1986). By the end of the nineteenth century, however, disqualification by reason of interest was abolished in almost all states and the federal court system. *Id.* Michigan abolished witness disqualification by interest in 1881 by adopting PA 245, now MCL 600.2159. *People v Renno*, 392 Mich 45, 52-53; 219 NW2d 422 (1974). Our Supreme Court soon held the statute was intended to permit a defendant to make his own defense. *People v Quick*, 51 Mich 547; 18 NW 375 (1883). As recently as 1986, while several state and federal courts had recognized a constitutional right to testify, the Supreme Court noted that it had not explicitly held such a right existed. *Nix, supra,* 164.

However, this Court in *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985), found that a defendant's right to testify was so entrenched in concepts of ordered liberty that it had attained constitutional status under the Fourteenth Amendment and Const 1963, art 1, §§ 17, 20. "We hold that an accused's right to convey his side of the story to the jury is contained in the constitutional guarantee of due process of law." *Id.* at 684. However, having found that a defendant has a constitutional right to testify, this Court rejected the two arguments urged by defendant in this case, holding that (1) the trial court was not required to conduct a waiver hearing on the record, and (2) defense counsel could waive a silent defendant's right to testify. This Court reasoned that to hold otherwise might result in judicial interference with a critical defense strategic decision, opining,

> We agree with the majority of courts which have addressed this issue and decline to require an on-the-record waiver of defendant's right to testify. Such a requirement would necessarily entail the trial court's advising defendant of his right to testify. As the Wisconsin Supreme Court stated in [*State v*] *Albright*, [96 Wis 2d 122, 134; 291 NW2d 487, cert den 449 US 957; 101 S Ct 367; 66 L Ed 2d 223 (1980)], a formal waiver requirement might "provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy." [*Simmons, supra,* 684.]
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> * * *
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> Our holding does not leave defendants without protection insofar as their right to testify is concerned. If the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection. If the record shows that the trial court prevented defendant from testifying, we will not hesitate to reverse its judgment. On the other hand, if defendant, as in this case, decides not to testify or acquiesces in his attorney's decision that he not testify, "the right will be deemed waived." *Albright, supra*. [*Simmons, supra,* 685.]

Subsequent to this Court's decision in *Simmons, supra*, the United States Supreme Court in *Rock v Arkansas*, 483 US 44, 49-53; 107 S Ct 2704; 97 L Ed 2d 37 (1987), explicitly recognized a defendant's right to testify as necessarily included in several constitutional provisions, including the Fourteenth Amendment Due Process Clause (an opportunity to be heard), compulsory process (the right to call himself as a witness), the Sixth Amendment right of

self-representation and as a corollary of the Fifth Amendment privilege against self-incrimination. The Supreme Court noted that while it had assumed in the past that a defendant's right to testify is a fundamental constitutional right ultimately within the defendant's control, the Court also recognized that a defendant's decision whether to testify is also an important trial tactical decision. *Id.*, 52-53 n 10.

Moreover, in *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986), this Court held that "an accused's decision to testify or not to testify is a strategic decision best left to an accused and his counsel." Our Supreme Court has also noted that "[a] defendant's decision whether to testify on his own behalf is an integral element of trial strategy." *Toma*, *supra*, 304.

This Court has consistently followed *Simmons, supra*. See *People v Drake*, decided sub nom *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991), and *People v Johnson*, 168 Mich App 581, 586; 425 NW2d 187 (1988). Furthermore, waiver by conduct is consistent with the waiver analysis employed by our Supreme Court in *People v Carter*, 462 Mich 206, 218-219; 612 NW2d 144 (2000), which held that "[b]ecause counsel has full authority to manage the conduct of the trial and to decide matters of trial strategy, we conclude that in this instance, waiver [of rereading of testimony] could be effected by the action of defense counsel."

In the present case, near the end of the prosecutor's case, the trial court, in the absence of the jury, announced on the record various instructions to be given, including, "[CJI2d] 3.3, defendant not testifying, assuming that, when we come back in here, that he's not going to testify. If he is, then we will take that out." After counsel and the trial court discussed jury instructions for about one hour, the jury was returned, and both counsel rested. The jury immediately was excused again to permit defense counsel to argue a motion for directed verdict. The record indicates that defendant made no effort to assert his right to testify, and therefore, his acquiescence to defense counsel's decision not to call him as a witness constitutes a waiver of his right to testify. *Simmons, supra*.

Defendant's claim of ineffective assistance of counsel also fails because as discussed above, the decision whether a defendant will testify or exercise his privilege not to testify, is a strategic decision best left to counsel and defendant. *Martin, supra*, 640. This Court will presume a decision that defendant not testify was a strategic one that "falls within the wide range of reasonable professional assistance." *Strickland, supra*, 689; *Simmons*, *supra*, 685. A difference of opinion as to whether a defendant should testify does not necessarily amount to ineffective assistance of counsel. *Burger*, *supra*, 791-792; *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987). Moreover, defendant has failed to establish a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Toma*, *supra*, 302-303.

In this case, defendant had confessed to killing the victim by manual strangulation and by cutting his throat. Physical evidence, including various items defendant helped the police recover and his necklace found in the victim's apartment, corroborated defendant's confession and linked him to the crime scene. Moreover, the prosecution presented evidence that defendant had a motive to commit the murder. Furthermore, defendant had taken actions and made statements that severely weakened his credibility if he had testified, including making a deceptive statement of lack of knowledge on the night of the murder, requesting that the victim's widow lie

about the necklace he lost, apparently in the struggle with the victim, making his initial false exculpatory statement to the police, and after his confession, giving another false exculpatory statement that counsel described as "so absurd" the police would not even listen.

Given the physical evidence, defendant's confession, and his lack of past candor, it clearly was a reasonable professional decision not to present defendant as a witness subject to the prosecutor's cross-examination. Any testimony of defendant that deviated from his confession, could not only be rejected by the jury, but harm counsel's effort to argue that the confession demonstrated the killing occurred in the "heat of passion" and was therefore only manslaughter or second-degree murder. Further, counsel's decision may well have been dictated by ethical considerations.

Finally, defendant's claim that counsel erred by failing to object to blood and DNA evidence, has not been supported with citations to authority why such evidence would not have been admitted over objection. *Kelly*, *supra*, 640-641. This Court has found blood and DNA evidence generally accepted in the scientific community and admissible. *People v Leonard*, 224 Mich App 569; 569 NW2d 663 (1997); *People v Chandler*, 211 Mich App 604; 536 NW2d 799 (1995). Moreover, to establish ineffective assistance of counsel, defendant must not only overcome the presumption otherwise, but also show that his trial was fundamentally unfair. *Leonard, supra*, 583, 592. Any error concerning blood and DNA evidence, where defendant argued the killing was in self-defense or in the heat of passion, was neither outcome determinative nor did it deprive defendant of a fair trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell