

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL THOMAS LUCERO,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 231977

Macomb Circuit Court

LC No. 00-001089-FC

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317. He was sentenced to twenty-five to fifty years' imprisonment. Defendant appeals as of right. We affirm.

I. Facts and Procedural History

In the early morning hours of January 1, 2000, Natalie Lester, the victim, died of a gunshot wound to the face. The victim was defendant's girlfriend. The victim rang in this tragic New Year, celebrating with defendant, her brother Adam Lester, and Amanda Mitchell. On the evening of December 31, 1999, the two couples went out to dinner and returned to defendant's house to watch videos and start drinking alcohol. Defendant was observed drinking tequila and beer. After toasting the New Year at midnight, the couples went to bed. The victim and defendant went upstairs to defendant's room and Adam and Amanda went to a bedroom downstairs. Approximately one hour later, defendant came running into the downstairs bedroom covered in blood, screaming that he had killed the victim. Adam and Amanda ran upstairs, with Adam calling 911. The victim was found lying on the bed in the upstairs bedroom with a gunshot wound to her face. A shotgun was on the floor next to the bed. The police arrived almost immediately and took defendant into custody.

While in custody, defendant made several inconsistent statements, which are the subject of this appeal. Before trial, defendant filed a motion to suppress those statements. After a *Walker*¹ hearing, the trial court suppressed defendant's custodial statements, finding that they

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

were not voluntary because of defendant's level of intoxication.² However, the trial court did indicate that the statements would be available for impeachment purposes if defendant elected to testify. Defendant did not testify at trial. Following the jury trial, defendant was convicted of second-degree murder. This appeal followed.

II. Defendant's Custodial Statements

Defendant first argues that the trial court erred in ruling that his involuntary statements were admissible for impeachment purposes and that the trial court's erroneous ruling violated his rights to testify and to due process of law as defendant claims that he elected not to testify on the basis of the trial court's ruling. We find that the trial court erred in ruling that defendant's involuntary statements could be used for purposes of impeachment. However, we hold that such error does not require reversal. See *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998).

It is well established that a defendant's involuntary statements "may not be used for any purpose at trial, either for substantive evidence or for impeachment purposes." *People v Tyson*, 423 Mich 357, 377; 377 NW2d 738 (1985), citing *People v Reed*, 393 Mich 342; 224 NW2d 867 (1975), cert den 422 US 1044, 1048 (1975). However, a defendant's voluntary statements taken in violation of *Miranda*³ may be used for impeachment purposes. *People v Stacy*, 193 Mich App 19, 24-25; 484 NW2d 675 (1992). In this case, the trial court suppressed defendant's statements because it determined that defendant was unable to make a voluntary, knowing, and intelligent waiver of his *Miranda* rights. Thus, assuming the correctness of the trial court's holding, such statements were inadmissible for any purpose at trial, including for purposes of impeachment. Accordingly, the trial court erred in ruling that defendant's involuntary statements could be used for purposes of impeachment.

Nonetheless, this Court finds the trial court's error harmless beyond a reasonable doubt. *Graves, supra*. This case presents a preserved, nonstructural constitutional error subject to the harmless error test. See *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (held harmless-error analysis applicable to the admission of involuntary confessions). Thus, the appropriate harmless error inquiry requires us to determine whether it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). We conclude that defendant was not so prejudiced by the trial court's erroneous ruling. First, there is no evidence on the record to indicate that defendant elected not to testify on the sole basis of the trial court's ruling. Indeed, defendant's trial counsel indicated that he had counseled defendant against testifying since the inception of the case, which was well before the trial court's ruling. Second, even if it could be inferred that defendant decided not to testify in order to avoid the impeachment with his prior statements, defendant has failed to establish that he was prejudiced by his failure to testify in his own defense. There is nothing in the record, nor does defendant indicate on appeal, what the

² The record indicates that on January 1, 2000, at 6:30 a.m., defendant's blood alcohol level was .19 and that several witnesses testified that defendant appeared "intoxicated" when taken into custody.

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

substance of his testimony would have been or that it would have affected the outcome of the trial. This Court will not reverse an otherwise valid conviction on the basis of speculation as to the reasons for defendant's refusal to testify and the content of defendant's purported testimony. Further, and more importantly, the overwhelming weight of the evidence, including defendant's own statement immediately after the shooting that he killed the victim, supports our conclusion that a rational jury would have found defendant guilty absent the error. Thus, we are persuaded beyond a reasonable doubt that the outcome of the trial would not have been different had defendant testified, and therefore, find no error requiring reversal. *Id.*

III. Ineffective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel. Because defendant failed to file a motion in the lower court or before this Court for a new trial or a *Ginther*⁴ hearing, our review of this issue is limited to errors apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). In fact, defendant invites us to review this claim based on the existing record, as he contends that the ineffective assistance is evident on the lower court record.

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

Defendant first claims that he was denied the effective assistance of counsel when his trial counsel failed to object to the trial court's erroneous ruling regarding the use of his involuntary statements for impeachment purposes. We disagree. Even assuming that defendant's trial counsel's performance in failing to challenge the trial court's clearly erroneous ruling was below an objective standard of reasonableness, defendant has failed to establish that he was prejudiced by counsel's error. As previously noted, defendant has failed to establish that but for counsel's error, the result of the trial would have been different. *Noble, supra*. As such, the failure to object to the trial court's erroneous ruling did not constitute ineffective assistance of counsel.

Similarly, defendant's final claim that he was also denied the effective assistance of counsel by his trial counsel's advice not to testify to avoid possible impeachment is without

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

merit. First, the decision whether to call or question witnesses is presumed to be a matter of trial strategy. *People v Garza*, 246 Mich App 251, 255-256; 631 NW2d 764 (2001). Defendant has not overcome the presumption that his trial counsel's advice not to testify was sound trial strategy. After a review of the record, it is not clear that trial counsel advised defendant not to testify solely on the basis of the potential for impeachment. Rather, the record indicates that it was trial counsel's recommendation "from the onset" that defendant not take the stand to testify. Thus, there could have been a multitude of reasons for counsel's advice. Further, defendant has failed to establish that counsel's advice not to testify prejudiced the outcome of the trial -- that the jury would have reached a different verdict had it considered defendant's testimony. *Noble, supra*. Contrary to defendant's argument, the record does not demonstrate that trial counsel's performance was deficient in this regard.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray