STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VIVIAN LAVINGTON,

Defendant-Appellant.

UNPUBLISHED
August 16, 2002

No. 231995
Wayne Circuit Court
LC No. 00-004081

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to a prison term of eight to twenty-five years. She appeals as of right. We affirm.

Defendant argues that the evidence was insufficient to support her conviction for second-degree murder because the prosecutor did not disprove her theory of self-defense. This Court evaluates a sufficiency of the evidence claim de novo by reviewing the evidence in a 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 proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The killing of another in self-defense is a justifiable homicide if the defendant honestly and reasonably believed that her life was in imminent danger, or that there was a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Once a defendant introduces evidence of self-defense, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Although there was evidence supporting defendant's theory of self-defense, there was also ample evidence to support the jury verdict. Both women lived in the same house, along with a man who had fathered children with both of them. Only defendant and the decedent were home at the time of the killing. Defendant testified that decedent attacked, kicked, choked and threatened her, that they struggled throughout the house for about thirty minutes, that the decedent scratched her face and neck, and that she feared for her life. The police, however, saw no signs of a struggle anywhere in the house. There was evidence that defendant and the decedent argued earlier in the day and that both were intoxicated.

After the stabbing and before the police arrived on the scene, defendant wiped the knife and put it back on her television where she used it as an antenna, changed her clothes, and tried to clean up. Defendant phoned 911 and told them she did not know who stabbed the decedent, because she "was in the kitchen" at the time. Defendant initially gave the police an exculpatory statement, and told them that her boyfriend or a patient at the nursing home where she worked scratched her face. Defendant told the police that she was walking home when she saw "three guys with black hoods exiting" the house where she and the decedent both lived, and that she entered the house and found the injured decedent. Later, however, defendant told the police that she stabbed the decedent because she was "angry and hurt," and at trial she explained she meant that the decedent had physically hurt her during the fight. It is apparent from the verdict that the jury did not believe defendant's claim of self-defense and we will not disturb its credibility determination.[1] *Nowack*, *supra*. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant's claim of self-defense was disproved beyond a reasonable doubt. *Hampton*, *supra*.

Defendant also asks this Court to apply the imperfect self-defense doctrine in this case. Second-degree murder can be mitigated to manslaughter on a theory of imperfect self-defense by negating the element of malice for murder. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). The Michigan Supreme Court has not recognized the theory of imperfect self-defense, and this Court has considered it only where a defendant would have been entitled to invoke the theory had he not been the initial aggressor. *Id.*, citing *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). However, it was not defendant's theory that she was the initial aggressor here. Further, the doctrine of imperfect self-defense has not been extended in Michigan to cases where, as alleged here, the defendant reacted with unreasonable force. *Kemp*, *supra* at 325. Therefore, the doctrine does not apply to the circumstances of this case. See generally *People v Riddle*, ___ Mich ___; ___ NW2d ___ (Docket No. 118181, decided July 31, 2002), slip op 2-5.

Defendant also raises two challenges involving alleged prosecutorial misconduct. "Prosecutorial misconduct issues are decided case by case. . . ." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted). This Court considers the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

First, defendant argues that the prosecutor improperly made "low blows to [defendant's] credibility." Although defendant testified that the decedent threatened to sexually assault her, she agreed that her statement to the police did not reflect any claim of sexual assault. According to defendant's first statement, defendant told the police that the decedent tried to "date" her "13 years ago, but I told her I was not like that and she never tried again." According to her second statement, defendant stabbed the decedent because she was "angry and hurt." Both statements were made after defendant was given *Miranda*[2] warnings. Defendant testified that she did tell

[1] We note that the trial court sentenced defendant without objection to a minimum of only eight years' imprisonment, citing mitigating circumstances that supported a sentence at the lower end of the statutory guidelines. See generally MCL 750.317, 769.34.

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

one of the officers that decedent was naked from the waist up when she tried to force herself into defendant's room on the night of the incident but that "[e]vidently he didn't write it down."

At trial, the prosecutor asked defendant, "Since March the 4th have you come forward to the police and given them another statement with your attorney telling them that that is what happened?" There was no objection to the question to which defendant answered, "No, I have not." Later, during closing argument, the prosecutor argued, again without objection, that the claim of sexual assault was not credible and that defendant recently fabricated the story because it was a "good defense." Defendant now argues that the prosecutor's question and argument infringed on her right to remain silent and her right to counsel. Because defendant did not preserve this issue with an appropriate objection to the prosecutor's question and argument at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant relies on *Doyle v Ohio*, 426 US 610; 969 S Ct 2240; 49 L Ed 2d 91 (1976), in which the United States Supreme Court ruled that a defendant's post-arrest silence cannot be used to impeach the defendant's exculpatory explanation, raised for the first time at trial. Here, however, defendant did not remain silent and does not argue that her statements were involuntary. As this Court noted in *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991):

> Defendant here did not choose to remain silent. [S]he chose to speak. Defendant cannot have it both ways – [s]he cannot choose to speak and at the same time retain [her] right to remain silent. Absent an affirmative and unequivocal invocation of [her] right to remain silent following a postarrest, post-*Miranda* warning statement to police, defendant cannot claim that [her] right to remain silent was infringed by the prosecutor's questions and comments about [her] failure to assert [her] claim of self-defense before trial.

A prosecutor properly may inquire and comment upon the defendant's failure to assert a defense subsequently claimed at trial. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). Further, defendant offers no explanation or authority for her suggestion that her right to counsel was violated by the prosecutor's question and comment. A party may not leave it to this Court to discover and rationalize the basis for her claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Consequently, we find no plain error affecting defendant's substantial rights. *Carines*, *supra*.

Defendant also complains that the prosecutor confused the jury and made misleading statements of law during closing and rebuttal arguments. Specifically, defendant complains of the prosecutor's characterization of the level of force that may be used in response to a "nonlethal attack." In response to an objection by defense counsel,[3] the trial court agreed that the

[3] Defendant also argues on appeal that the prosecutor improperly omitted fear of forcible sexual penetration as a justification for self-defense, but did not make that particular argument below. Because no objection was raised on this ground below, this claim is also reviewed for plain error affecting defendant's substantial rights. *Carines*, *supra.*

prosecutor's remarks were improper but found that defense counsel had "countered" the prosecutor's remarks in his own closing argument, it was hesitant to "give more weight" to the prosecutor's comments by emphasizing them to the jury, and concluded that any error could be cured by its instruction to the jury. Defense counsel agreed that the court could "clear up" the confusion with a proper instruction. The trial court subsequently instructed the jury on self-defense and also instructed that the arguments of counsel are not evidence Defendant had no objections to the jury instructions. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). On this record, we are not convinced that it is more probable than not that the prosecutor's comments were outcome determinative, *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), or that a plain error affected defendant's substantial rights, *Carines, supra*. Thus, defendant was not denied a fair trial. *Reid, supra*.

Defendant also raises several claims of ineffective assistance of counsel. Because defendant did not request a *Ginther*[4] hearing, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id*.

First, defendant asserts that counsel was ineffective for failing to object to the alleged prosecutorial misconduct discussed above. As noted previously, defendant has not shown that she was prejudiced by the alleged misconduct, and thus has not established ineffective assistance on this basis. Defendant also argues that counsel was ineffective for failing to object to the omission of an instruction on self-defense when forcible sexual penetration is threatened. Counsel raised the question of the decedent's sexual advances in closing argument, but chose to assert a defense based primarily on the decedent's alleged physical attack on defendant. This was a matter of trial strategy which we will not second-guess. *Avant, supra*. "The fact that counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996) (citation omitted).

Defendant also argues that counsel was ineffective for stipulating that it was satisfactory for the trial court to answer the jury's request for copies of defendant's testimony with a note that "the transcript is not available, thus you will have to rely on your collective memory." On the record before us, it is not apparent that counsel's performance was deficient. Counsel may well have believed as a matter of trial strategy that allowing the jury to examine defendant's testimony would have been more harmful than good. *Id*.; *Avant, supra.*

Defendant also claims that counsel was ineffective for failing to move to exclude evidence that her child was removed into foster care. It was plaintiff's theory that defendant and the decedent argued when the decedent intervened in a conversation about defendant's child, who was in foster care. The child's father testified that he "lost" his son "because he was in the

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

system because of [defendant's] history of drugs and alcohol and I'm a recovering alcoholic myself."

Defendant does not explain why the evidence concerning an argument between herself and the decedent, which was relevant to the question of motive, was inadmissible. Further, on the record before us, it does not appear to be more prejudicial than probative. MRE 403. Defense counsel is not required to make futile motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Moreover, although counsel might have objected to some aspects of the testimony, he may have chosen as a matter of trial strategy not to emphasize the prejudicial information with an objection. Decisions about calling and questioning witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant herself later testified concerning her efforts at rehabilitation and the positive steps she had taken to get her son back. When the jury submitted questions, including one about "why and what" was the reason for defendant's child being in foster care, the trial court, with the agreement of counsel, instructed the jury that the questions were "not appropriate at this time." Again, counsel may well have chosen as a matter of trial strategy not to emphasize the prejudicial information by asking the trial court to respond to the jury's question. On this record, defendant has not overcome the presumption that counsel's actions were reasonable. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Finally, defendant argues that she was denied a fair trial because of the cumulative effect of counsel's errors. Because we have rejected defendant's claim that counsel was ineffective, reversal under this theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999); *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell