STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD SCOTT MANNING,

Defendant-Appellant.

UNPUBLISHED
October 22, 2002

No. 237411
Marquette Circuit Court
LC No. 00-037867-FC

Before: Hood, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

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

Defendant first argues that the trial court erred by denying his motion to quash the original charge of open murder. Because the information was amended before trial to charge only second-degree murder and defendant does not challenge the sufficiency of the evidence for second-degree murder, we conclude that any error was harmless, because it had no effect on the proceedings. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990); see also *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001), and *People v Staffney*, 187 Mich App 660, 662-663; 468 NW2d 238 (1990).

Defendant next argues that the trial court erred when it determined that his statements made at the time of his polygraph examination, although subject to exclusion pursuant to *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), could still be used for impeachment purposes because they were voluntarily made. As a threshold matter, we note that defendant never testified at trial and, therefore, the statements in question were never admitted. Further, there is no indication on the record that defendant's decision not to testify was based on the trial court's ruling, nor did defendant make an offer of proof with regard to any proposed testimony. Under these circumstances, it is questionable whether this issue is properly preserved. Compare *United States v Luce*, 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984), and *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988), with *United States v Chischilly*, 30 F3d 1144, 1150-1151 (CA 9, 1994), and *Biller v Lopes*, 834 F2d 41, 43-44 (CA 2, 1987). Assuming, however, that defendant's claim that his statements were involuntary is properly before us, we find no basis for relief.

The question of voluntariness is dependent on the absence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). We review the question of voluntariness independent of the trial court, but give deference to the trial court's superior opportunity to evaluate the credibility of the witnesses who testified at the suppression hearing. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Having considered the totality of the circumstances surrounding defendant's statements, we are not persuaded that the statements were the result of psychological coercion so as to render the statements involuntary. See *id.* at 752-753; *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988); *People v DeLisle*, 183 Mich App 713, 721-722; 455 NW2d 401 (1990).

Defendant next argues that the trial court erred by excluding evidence of the victim's blood alcohol level. We disagree. The trial court did not abuse its discretion in excluding the evidence. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The defense theory was that defendant discharged the gun accidentally and that the victim was merely in the line of fire. Defendant failed to show that the victim's blood alcohol level was relevant to a material fact in the case, i.e., a fact within the range of litigated matters in controversy. MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000); *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996). Further, even if the victim's blood alcohol level could be considered minimally relevant, its probative force was slight and the trial court did not abuse its discretion in concluding that it should be excluded under MRE 403, because of its tendency to lead to confusion of the issues.

Defendant next argues that the trial court erred by admitting expert testimony on the trajectory of the gunshot. Defendant asserts that the testimony was incomplete and, therefore, failed to assist the jury. We conclude that defendant failed to preserve this specific claim because he did not timely object or move to strike the testimony on this ground at trial. MRE 103(a)(1); see also *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (objection to evidence on one ground is insufficient to preserve an appellate attack on another ground). Indeed, the record indicates that defense counsel waived his claim concerning trajectory testimony by informing the trial court, after hearing the prosecutor's offer of proof at trial, that "if he wants to testify regarding the trajectory, based on what I've heard from him today, I don't have a huge problem with him limiting his argument to trajectory." A waived issue, as distinguished from an issue subject to forfeiture by the failure to object, extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

In any event, a review of the trial court's ruling on this issue reveals that the court did not abuse its discretion. The prosecutor established an adequate foundation for the admission of expert testimony under MRE 702. Personal observations were not required for the witness to give an opinion. MRE 703; *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992). Further, defendant has not established any plain error in connection with his newly raised claim that the testimony was incomplete. See *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999); see also *People v Coy*, 243 Mich App 283, 286-287; 620 NW2d 888 (2000). The alleged factual deficiencies affect only the weight of the evidence, not its admissibility. See MRE 104(e); see also *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987). The jury was free to disregard or discredit the evidence. *People v Adams*, 195 Mich App 267, 279; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916 (1993).

Defendant next argues that the trial court erred by precluding a defense of diminished capacity or voluntary intoxication. We disagree. Voluntary intoxication is not a defense to second-degree murder. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998); *People v Langworthy*, 416 Mich 630, 651; 331 NW2d 171 (1982). Further, diminished capacity is not a cognizable defense in Michigan. *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001).

To the extent that defendant further claims that the trial court precluded him from presenting an insanity defense, we find no support for this claim. The record reflects that the trial court afforded defendant an opportunity to present an insanity defense, conditioned on his ability to offer qualified expert testimony that met the statutory standards for legal insanity. See MCL 768.21a(1). Having failed to show that he proffered a qualified expert on legal insanity, we conclude that defendant has not demonstrated error.

Finally, to the extent defendant claims that the trial court gave an erroneous instruction on the defense theory of accident, we find that defendant's claim is not properly before us because it is beyond the statement of his issue and is inadequately briefed. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Regardless, the record reflects that there was no defense objection to the jury instructions on the defense theory of an accidental shooting, thereby precluding appellate relief absent a plain error affecting defendant's substantial rights. *Carines*, *supra*; *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). A review of the jury instructions in their entirety reveals that they fairly presented the defense theory that the shotgun accidentally discharged when defendant's knee gave out. The fact that the accident instruction was preceded by an accurate statement of law on voluntary intoxication not being a defense to second-degree murder does not demonstrate plain error. The defense theory of accident was not negated by this instruction.

Affirmed.

/s/ Harold Hood
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell