STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW DAVID POWELL,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 228267
Oakland Circuit Court
LC No. 1999-166876-FC

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316(1)(a). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of life imprisonment without parole for each conviction. He appeals as of right. We affirm defendant's convictions, but remand for amendment of the judgment of sentence to delete the language identifying the life sentence for the conspiracy conviction as being nonparolable.

I

Defendant argues that his convictions are against the great weight of the evidence and violate his due process rights. Due process commands a directed verdict of acquittal when the trial evidence is insufficient to sustain a conviction. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). By comparison, a trial court may order a new trial on any ground that would support appellate reversal of a conviction or because it believes that the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). This Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* Absent exceptional circumstances, issues of witness credibility are for the jury to decide, and the trial court may not substitute its view for the jury's determination thereof. *Lemmon, supra* at 642. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647.

Because defendant's argument is not directed at the legal sufficiency of the evidence, but rather, is predicated on a claim that the verdicts were against the great weight of the evidence, it

is unnecessary to address whether due process would command a directed verdict of acquittal. Further, limiting our review to the evidence admitted at trial, we find no basis for disturbing the trial court's decision denying defendant's motion for a new trial.

"In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). More than one person may contribute to the death of a victim. *People v Bailey*, 451 Mich 657, 677; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). "In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributing cause that was a substantial factor in producing the harm." *Id.* at 676. Further, under an aiding and abetting theory of criminal liability, the prosecutor must prove that the crime charged was committed by the defendant or some other person and that the defendant performed acts or gave encouragement that assisted the commission of the crime. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). The requisite intent for aiding and abetting liability is that necessary to be convicted as a principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

We reject defendant's claim that his statements to police officers contradicted physical facts concerning the cause of the victim's death. Although the evidence indicated that defendant gave inconsistent statements regarding how the victim died, reasonable jurors could find from defendant's statements that both defendant and Jason Cross took steps to kill the victim, e.g., Cross pressing his fist against the victim's throat as she laid on the floor and defendant thereafter holding a plastic bag over the victim's face as she moaned and groaned. We find no evidence of indisputable physical facts that would have precluded a reasonable juror from finding that defendant's act of holding the plastic bag over the victim's face was a cause of her death. At best, the evidence reflects that two pathologists, Dr. Dragovic and Dr. Chung, who both performed autopsies on the victim, reached different conclusions regarding to the precise cause of death from the physical condition of the victim's body and other information gathered at the time of their respective autopsies.

In general, the purpose of expert testimony is to assist the jury in understanding the evidence or factual issues. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986); MRE 702. An expert witness may state an opinion based on his or her own observations, a hypothetical question, the testimony of other witnesses, hearsay, or even findings and opinions of other experts. *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992). Here, the only expert to testify at trial was Dr. Dragovic, who performed the second autopsy on the victim. Dr. Dragovic expressed a number of opinions based on hypothetical questions and provided information about the variables that might affect certain factual issues, such as how much time must elapse for asphyxiation to cause death.

Dr. Dragovic also opined, as part of his diagnosis by exclusion, that the cause of the victim's death was asphyxiation by compression and obstruction of the airway. Under Dr. Dragovic's understanding of this concept, a person's airway could be blocked by pressing a hand on the neck in such a way as to block the airway. Placing a non-porous plastic bag over the person's nose and mouth would also be consistent with this type of asphyxiation. Although Dr. Dragovic acknowledged that Dr. Chung's report regarding her own autopsy indicated that the victim's cause of death was asphyxiation by manual strangulation, a concept which Dr. Dragovic

defined as involving blockage of the blood supply that carries oxygen to the brain by applying force to both sides of the neck, Dr. Dragovic's disagreement with the cause of death indicated in Dr. Chung's report does not establish that the verdict was against the great weight of the evidence. Absent evidence of indisputable physical facts, which would have precluded reasonable jurors from finding that the cause of the victim's death was asphyxiation by compression and obstruction of the airway, we find no basis for disturbing the trial court's denial of a new trial relative to the first-degree premeditated murder conviction. *Lemmon, supra* at 647.

We also find no basis for disturbing the trial court's denial of a new trial relative to the conspiracy conviction. The gist of a conspiracy lies in the unlawful agreement between two or more persons. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The defendant must have both an intent to combine with others and the intent to accomplish the illegal objective. *Mass, supra* at 629. However, as the trial court indicated when denying defendant's motion for a directed verdict at trial, a formal agreement is not required. Proof of a conspiracy can be derived from the circumstances, acts and conduct of the parties. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Hence, the prosecutor's use of circumstantial evidence to establish an unlawful agreement between Cross and defendant to commit first-degree murder does not establish that the verdict was against the great of the evidence. We do not find indisputable physical facts to support defendant's position that the illegal objective was accomplished by Cross before defendant's involvement. *Lemmon. supra* at 647. The evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *McCray, supra* at 638.

II

Next, we consider defendant's claim that the prosecutor engaged in misconduct during his closing and rebuttal arguments by appealing to the jury's sympathy. Because defense counsel did not object to the prosecutorial remarks at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Although the prosecutor's remarks about the victim's mother were improper, the trial court's instruction that the jurors should not let sympathy or prejudice influence their decision was sufficient to dispel any prejudice. *People v Long*, 246 Mich App 582, 589-590; 633 NW2d 843 (2001). Indeed, we note that defense counsel, while not objecting to the prosecutor's remarks, chose to address the remarks in his own closing argument by asking the jury not to let sympathy influence its decision. The prosecutor's response to defense counsel's remarks in his rebuttal argument does not plainly indicate that the prosecutor was making a further appeal to the jurors' sympathy. Furthermore, even if there was error, defendant has failed to show it affected the outcome. *Schutte, supra.*

Examined in context, the other prosecutorial remarks challenged by defendant do not constitute outcome-determinative plain errors. *Schutte, supra*. Defendant has not established any prosecutorial misconduct that, singularly or cumulatively, served to deprive him of a fair trial. *People v Bahoda*, 448 Mich 261, 292; 531 NW2d 659 (1995).

III

Next, defendant argues that he was denied the effective assistance of counsel. A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error. *Id.* at 579. Questions of constitutional law are reviewed de novo. *Id.* at 579. To establish ineffective assistance of counsel, defendant must show

> that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.* at 167. [*People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).]

Because the trial court did not conduct an evidentiary hearing, our review is limited to the facts of record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000); *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). "To the extent [defendant's] claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for new trial . . . ." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Although this Court is empowered to remand for an evidentiary hearing when a trial court fails to conduct such a hearing, a remand is unnecessary if a defendant fails to show a factual dispute or an area in which further elucidation of facts might advance his position. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995).

Here, giving due regard to the opportunity afforded by the trial court to defendant to make an offer of proof or supplement his motion for new trial to show the need for an evidentiary hearing, we are not persuaded that remand for an evidentiary hearing is required. Neither the affidavit of Dr. Laurence Simson, Jr., a forensic pathologist, nor the report of Michael Abramsky, a licensed psychologist, which defendant submitted to the trial court, demonstrate a factual dispute or area in which further elucidation of facts might advance defendant's position that defense counsel was ineffective.

Defendant first claims that defense counsel was ineffective because he did not move to suppress his statements on the basis that they were the fruit of an illegal arrest. Defendant claims that he was arrested for investigative purpose on May 8, 1999, without probable cause. Although the record does not disclose why defense counsel did not move to suppress defendant's statements on this ground, see *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999), it is apparent from the record that such a motion would not have been successful. Defense counsel is not required to advance a meritless position or to make useless motions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999).

The fact that the police desired to question defendant initially for investigative purposes is not material because the legal standard for an arrest is not dependent on the purpose of the police action. A "seizure" under the Fourth Amendment occurs when, in view of all the surrounding circumstances, a reasonable person would have believed that he or she was not free to leave. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998); *People v Armendarez*, 188 Mich App 61, 69; 468 NW2d 893 (1991). If a police officer "approaches a person and seeks voluntary cooperation through noncoercive questioning, there has been no restraint on the person's liberty and the person is not seized." *Shankle, supra* at 693.

The evidence presented at the pretrial *Walker*[1] hearing on defendant's motion to suppress his statements, based on the theory that he did not knowingly and intelligently waive his *Miranda*[2] rights, indicates that defendant voluntarily accompanied the police to the police station on May 8, 1999, and voluntarily spent the night in an interview room of the detective bureau with the intent of taking a polygraph examination the next morning. The evidence at trial indicates that defendant made incriminating statements on May 9, 1999, about his involvement in the victim's death. Because the facts of record do not indicate that defendant was subjected to a warrantless arrest prior to making the incriminating statements on May 9, 1999, we conclude that defendant has failed to demonstrate a reasonable probability that a motion to suppress his statements on this ground would have been successful. The incriminating statements that defendant subsequently gave on May 9, 1999, provided probable cause for his warrantless arrest. *People v Shabaz*, 424 Mich 42, 58; 378 NW2d 451 (1985).

Defendant also claims that defense counsel was ineffective because he did not move to suppress defendant's police statements made between May 8 and May 11, 1999, on the ground that the statements were involuntary. In considering this issue, we note that there is no record evidence that defense counsel failed to investigate this issue before trial, although defense counsel ultimately moved to suppress defendant's statements solely on the ground that defendant did not knowingly and intelligently waive his rights. We further note that defense counsel was successful in having defendant undergo psychological or psychiatric evaluations relative to his statements before trial. Thus, we find no facts of record, or even an offer of proof, supporting defendant's claim that defense counsel's performance in this regard fell below an objective standard of reasonableness.

Furthermore, even assuming that defense counsel erred by not moving to suppress defendant's statements on the ground that they were involuntary, or finding a proposed expert like Abramsky to offer testimony at the *Walker* hearing, we would find no basis for disturbing the trial court's determination that the outcome of the motion to suppress would have been the same. "Any interview of one suspected of a crime by a police officer will have coercive aspects of it, simply by virtue of the fact that the police officer is part of the law enforcement system which may ultimately cause the suspect to be charged with a crime." *People v Mendez*, 225 Mich App 381, 383; 571 NW2d 528 (1997), quoting *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977). While it is nevertheless well recognized that statements may be involuntary as a result of psychological coercion, *People v DeLisle*, 183 Mich App 713, 721-

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

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

722; 455 NW2d 401 (1990), the voluntariness of a defendant's statements is a question of law that a court determines under the totality of the circumstances. *Snider, supra* at 417. Psychologists and psychiatrists are not experts at discerning the truth. *People v Beckley*, 434 Mich 691, 728; 456 NW2d 391 (1990) (Brickley, J.). A judge, and not an expert witness, is the ultimate decisionmaker on such legal issues. See *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997). This Court reviews the issue of voluntariness independent of the trial court, but 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).

Here, neither the facts of record nor Abramsky's report raise questions of fact regarding whether defendant was psychologically coerced to provide false statements to the police between May 8 and 11, 1999. We are satisfied from the existing record that defendant failed to show a reasonable probability that any of his statements between May 8 and 11, 1999, would have been suppressed had defense counsel filed a pretrial motion to suppress on this ground.

Defendant next claims that defense counsel was ineffective for failing to present a substantial defense concerning the cause of the victim's death. Defendant argues that defense counsel should have called Dr. Chung as a trial witness to allow her to testify about her autopsy, but relies on the affidavit of a different forensic pathologist, Dr. Simson, as support for his claim of ineffective assistance of counsel.

The failure to call a witness at trial can constitute ineffective assistance of counsel if it deprives a defendant of a substantial defense, i.e., "one that might have made a difference in the outcome of the case." *People v Kelly*, 186 Mich App 524, 427; 465 NW2d 569 (1990). Here, however, we find Dr. Simson's affidavit irrelevant to the question of whether Dr. Chung could have provided defendant with a substantial defense if she had testified as a trial witness. Further, giving due regard to the opportunity afforded by the trial court to allow defendant to make an offer of proof in support of his claim of ineffective assistance of counsel, we conclude that defendant has not established any basis for finding that defense counsel's failure to call Dr. Chung constituted either deficient performance or was prejudicial. By not calling Dr. Chung to testify, defense counsel was able to demonstrate a weakness in Dr. Dragovic's conclusions without risking the possibility of Dr. Chung providing harmful testimony. Potentially, Dr. Chung could have clarified her conclusions reached at the time of her May 7, 1999, autopsy or provided further opinions, such as answers to hypothetical questions, which would have been harmful to defendant. There is no indication that Dr. Chung would have ruled out asphyxiation by compression and obstruction of the airway, as that concept was defined by Dr. Dragovic, as a cause of the victim's death. Hence, based on the facts on the record, defendant has not shown a reasonable probability that the trial outcome would have been different had Dr. Chung been called as a trial witness.[3]

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[3] We note that defendant does not specifically argue on appeal that defense counsel was ineffective for not having a pathologist, such as Dr. Simson, who did not perform an autopsy of the victim, testify at trial. In any event, we find no error in the trial court's determination that it was unlikely that the outcome of the trial would have been different had Dr. Simson been called.

We also reject defendant's claim that defense counsel's failure to use Dr. Dragovic's preliminary examination testimony during his cross-examination of Dr. Dragovic at trial constituted deficient performance. Defense counsel's decisions regarding what questions to ask witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. Defendant has not overcome the presumption that the actual cross-examination undertaken by defense counsel fell below an objective standard of reasonableness. Further, we are unpersuaded that defendant has established any discrepancies between Dr. Dragovic's trial and preliminary examination testimony that would have provided a substantial defense.

Defendant next argues that defense counsel was ineffective by essentially pleading his guilt and arguing a nonexistent duress defense. The facts of record do not support defendant's claim. The trial court instructed the jury that duress was not a defense to murder. Examined in context, defense counsel's arguments about defendant being afraid do not reflect an attempt by defense counsel to nevertheless argue duress as a defense to murder, but rather constituted arguments about evidence that defendant was afraid. It is apparent from the record that defense counsel defended against the charges by arguing that the prosecutor did not prove all the necessary elements for first-degree murder, such as intent to kill and causation, or a requisite agreement for the conspiracy charge. Although the record shows that defense counsel conceded that defendant placed a plastic bag over the victim's face, defense counsel did not concede that this act was the cause of the victim's death or that defendant was otherwise guilty of first-degree murder. Because defense counsel did not make a complete concession of guilt, we reject defendant's claim that he was denied the effective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

Defendant next argues that defense counsel was ineffective by allowing him to attend a polygraph examination on March 8, 2000, and by not personally attending that polygraph examination. Giving deference to the trial court's finding that the polygraph examination was arranged to give defendant an opportunity to perhaps obtain a reduced charge, we find that defendant has failed to establish support for his claim of ineffective assistance.

Defendant's reliance on *Tyler v United States (On Remand)*, 78 F Supp 2d 626, 631 (ED Mich, 1999), is misplaced because that case did not involve a waiver of the right to counsel. Defendant had a right to waive the presence of counsel at the polygraph examination. See *United States v Eagle Elk*, 711 F2d 80 (CA 8, 1983), and *People v McElhaney*, 215 Mich App 269, 274-276; 545 NW2d 18 (1996). In the case at bar, State Police Lieutenant Ernest Myatt testified at the trial that defendant waived his rights.[4] We further note that defendant has not shown any basis for finding an ineffective waiver of his right to counsel.

Examined in this context, the material question is not whether the March 8, 2000, polygraph examination could be considered a sound trial strategy, but rather whether defense counsel adequately advised defendant of his rights so that he could make an understanding decision regarding whether to undergo the polygraph examination. Cf. *People v Effinger*, 212 Mich App 67, 70-72; 536 NW2d 809 (1995) (when a defendant claims that he was denied the

[4] Although testimony regarding defendant's statements during the polygraph examinations was admitted at trial, the witnesses did not mention the polygraph examinations in their testimony.

effective assistance of counsel relative to a guilty plea, the determination to be made is whether the plea was voluntarily and understandingly made; defense counsel need not insist that the case go to trial). Because defendant does not address this issue and the facts of record do not establish any basis for finding that defense counsel rendered deficient performance, we conclude that defendant's claim of ineffective assistance of counsel on this basis cannot succeed.[5]

Defendant also claims that defense counsel was ineffective for failing to object to the prosecutor's misconduct. We disagree. Even if an objection to some of the prosecutor's remarks on the ground that they constituted an appeal to sympathy would have been appropriate, defendant has not shown that defense counsel's decision to address those remarks in his own closing argument, rather than object, constituted unsound strategy. The remaining prosecutorial remarks challenged by defendant on appeal fail to show any basis for relief grounded on ineffective assistance of counsel.

Finally, defendant claims that the cumulative effect of defense counsel's errors warrants reversal. We disagree. Defendant has not established any actual errors which, cumulatively or singularly, deprived him of a fair trial. *Bahoda*, *supra* at 292.

IV

Lastly, defendant claims that the trial court erred in sentencing him to life without parole for his conviction of conspiracy to commit first-degree murder. We agree. A sentence of life imprisonment without parole for conspiracy to commit first-degree murder is invalid. *People v Jahner*, 433 Mich 490; 446 NW2d 151 (1989). A person sentenced to life imprisonment for conspiracy to commit first-degree murder is eligible for parole pursuant to MCL 791.234(6), formerly MCL 791.234(4). *Id.* at 504. Hence, we remand for an amended judgment of sentence to reflect that defendant is eligible for parole for the conviction of conspiracy to commit murder.

Affirmed in part and remanded for the limited purpose of amending the judgment of sentence consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper

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[5] We disagree with defendant's claim that his March 8, 2000, statement provided the most incriminating piece of evidence at trial. Defendant's earlier statements in May 1999 formed the basis for the first-degree premeditated murder and conspiracy charges. We are unpersuaded that defendant was prejudiced by evidence that he claimed to have "freaked out" and did not know if he caused the victim's death in his March 8, 2000, statement.