STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 16, 2003
v JASON DENARD SMART, Defendant-Appellee.	No. 236522 Wayne Circuit Court LC No. 01-000926-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JASON DENARD SMART, Defendant-Appellant.	No. 239838 Wayne Circuit Court LC No. 01-000926-01

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317, and commission of a felony while in possession of a firearm, MCL 750.227b, following a jury trial. The trial court sentenced defendant to fifteen to thirty years' imprisonment for the murder conviction and a consecutive two-year sentence for felony firearm. The prosecution appeals as of right in Docket No. 236522, asserting that the trial court did not have substantial and compelling reasons to depart downward from the guidelines range in sentencing defendant for murder. Defendant appeals as of right in Docket No. 239838, asserting that the trial court abused its discretion by reinstating the charge of second-degree murder after the district court ruled that the evidence was insufficient to bind defendant over on second-degree murder, and ineffective assistance of counsel. We affirm in both cases.

I

Defendant was charged with second-degree murder and possession of a firearm during the commission of a felony in connection with the shooting death of his girlfriend, Shanita

Haywood. At the preliminary examination in January 2001, the district court bound defendant over on involuntary manslaughter and felony-firearm, noting that there was nothing in the evidence to suggest that defendant had an intent to kill. In May 2001, the prosecution moved the circuit court to reinstate the second-degree murder charge. The court granted the motion. The jury convicted defendant of second-degree murder and felony-firearm. Defendant hired new counsel and moved for a new trial, asserting, inter alia, that trial counsel was ineffective for failing to adequately convey a plea offer to defendant. The trial court held a *Ginther* hearing limited to the plea offer issue, after which it found that trial counsel had conveyed the plea offer to defendant, defendant rejected the plea offer of his own free will, trial counsel did not encourage defendant to do so, and defendant had thus failed to establish the requisite prejudice to establish ineffective assistance of counsel. This appeal ensued.

It is undisputed that defendant shot Haywood; the issue at trial was whether defendant did so with malice, or whether the shooting was negligent or an accident. At various times after the shooting, defendant gave differing stories regarding how Haywood was shot. Defendant initially went to his neighbor David Ray Ellis' apartment seeking medical assistance and told Ellis that the victim shot herself. Defendant also told the first officers on the scene that Haywood shot herself. Later, in an interview with Detroit Police Sergeant Christopher Vintervoghel, defendant claimed that Haywood found the gun and asked how it worked and when defendant took the gun back and attempted to close the cylinder, it went off. Apparently, however, after being told that the gun could not have discharged in such a way, defendant gave another statement to Detroit Police Detective Kenneth Gardner in which he admitted that when he took the gun from Haywood, he closed the cylinder and pulled back on the hammer and then began waving the gun from left to right, when it discharged.

Defendant acknowledges that he attempted to cover up his involvement in the shooting. He admits that after the shooting, he did not immediately call 911 as Ellis requested he do. Instead defendant ran outside and threw the gun into the snow. Defendant also admits that he then went outside and retrieved the gun, brought it back in, cleaned it with a towel, and put it in Haywood's hand. He then called 911. Defendant claimed that he did this because no one would believe the shooting was an accident.

II

Defendant first argues on appeal that the trial court abused its discretion by reinstating the charge of second-degree murder after the district court ruled that the evidence was insufficient to bind defendant over on second-degree murder.

Any errors associated with allowing a defendant to stand trial are rendered harmless by the presentation of sufficient evidence at trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Therefore, the issue before us is whether the prosecution presented sufficient evidence at trial to convict defendant of second-degree murder. We conclude that it did.

In reviewing the sufficiency of the evidence, this Court views the evidence in the 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 proved beyond a reasonable doubt. *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000). The elements of second-degree murder are (1) a death, (2) caused by defendant's act, (3) with malice, and (4) without justification. *People v*

Mendoza, 468 Mich 527, 534-535; 664 NW2d 685 (2003), citing *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Second-degree murder is a general intent crime, which mandates proof that the killing was done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003), citing *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001).

The evidence showed, without dispute, that defendant caused the death of his girlfriend by shooting her in the eye. From this, the jury was permitted to infer that defendant committed the killing with malice. *People v Morrin*, 31 Mich App 301; 187 NW2d 434 (1971).

A reasonable jury could have concluded, based on defendant's testimony, that defendant was guilty of involuntary manslaughter. However, the jury was not obliged to accept defendant's testimony, and acceptance of his testimony would not, in any event, lead only to the conclusion that he lacked the requisite malice as a matter of law. The question is one of evidentiary sufficiency. Malice is clearly a necessary element of murder. The jury is free to find malice, or not, based on its assessment of the evidence. "[I]f it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder." *Morrin, supra* at 318, quoting *Woolmington v The Director of Public Prosecutions*, AC 462, 480 (1935). In this case, there was evidence that defendant killed his girlfriend. That evidence of homicide permitted the jury to find malice, "[b]ut it in no sense *compels* such a finding." *Morrin, supra* at 317 (emphases in original). The issue of malice was properly submitted to the jury based on the evidence that defendant shot his girlfriend in the eye. The added evidence of defendant's efforts to make it look like his girlfriend shot herself could, if the jury found it appropriate, be used by the jury in assessing and rejecting defendant's version of the events. It was not necessary for the prosecution to present any additional evidence to support the charge of murder.

Further, even if the jury accepted defendant's version of the events, a finding of malice would be adequately supported.[1] "A jury can properly *infer* malice from evidence that a

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[1] In *People v Goecke*, 457 Mich 442, 466; 579 NW2d 868 (1998), the Court noted:

> As a necessary element of second-degree murder, malice reflects the principle that criminal culpability must be tied to the actor's state of mind. However, as we have repeatedly held, the mens rea for second-degree murder does not mandate a finding of specific intent to harm or kill. [*People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).] The intent to do an act in obvious disregard of life-endangering consequences is a malicious intent.
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> Because depraved-heart murder is a general intent crime, the accused need not actually intend the harmful result. One way of expressing this concept is that malice may be established even absent an actual intent to cause a particular result if there is wanton and wilful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm.

defendant intentionally set in motion a force whose natural tendency is to cause death or great bodily harm." *Goecke, supra* at 467 n 29, citing *People v Aaron*, 409 Mich 672, 729; 299 NW2d 304 (1980). "[T]he issue of malice must always be submitted to the jury." *Aaron, supra* at 729.

The facts and circumstances of this killing were such that the jury could infer the requisite malice for second-degree murder, *Aaron, supra; People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991), from the evidence that "the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Goecke, supra; People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999). A jury could reasonably infer that defendant set in motion a force likely to cause death by wielding a loaded gun, pulling the hammer back and waving it within inches of his girlfriend's face.

III

Defendant also argues on appeal that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of showing otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *Knapp, supra*. The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id*. at 385-386. This Court will not second-guess counsel regarding matters of trial strategy and, even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *Id*. at 386-387 n 7.

Whether a person was denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court first must find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *Id*.

A

At the *Ginther* hearing, defendant argued he was denied the effective assistance of counsel because defense counsel failed to adequately convey a plea offer. Defendant's trial counsel testified at the *Ginther* hearing that the prosecution had made an offer before the second-degree murder charge was reinstated, that he conveyed the offer to defendant a number of times, that he thought in was in defendant's best interest to accept the plea, that he told defendant that it was not worth the risk of trial, that defendant responded that he could not go to prison, and that he never encouraged defendant to reject the plea and go to trial. Trial counsel acknowledged that he did not put the plea offer in writing and did not make a record of it at any court proceeding, including the final pre-trial conference, which the record indicates occurred on March 2, 2001. However, the trial court recalled off the record discussions regarding the plea offer and defendant's having rejected the offer:

THE COURT: Okay, let me ask you this. Let me interrupt you, Ms. Woods.

EXAMINATION

BY THE COURT:

* * *

Q. Okay. And do you recall one time prior to the Court setting this matter for Final Conference. That the Court, although it was not on the record, went off the record and had conversations with you and Mr. Smart regarding this? Do you remember that?

A. No, Your Honor. But I – just vaguely I remember it.

Q. Okay.

A. Yes, ma'am.

Q. And there was an offer of six months on the Involuntary Manslaughter and two years on the Felony Firearm?

A. That sounds like what happened. Yes, ma'am.

Q. And this was prior to the prosecution asking that the case be reinstated. Do you remember that?

A. Yes, ma'am, I remember from when the motion was filed.

* * *

Q. All right, so – Okay, so you do vaguely remember that this Court, not no Judge anybody, but this Court said it off the record.

A. That's right, we did have a conversation.

Q. And he did not want to do it?

A. That's right. That's right.

Q. And at that time he was tearful; is that correct?

A. Yes, ma'am, he was.

Trial counsel further testified that he was sure he conveyed to defendant that he only had so much time to accept the plea, that it could not be accepted on the day of trial; that he did not tell defendant in February or March that it was too late to accept the plea; that defendant never communicated to him that he wanted to accept the plea; and that counsel never advised

defendant that he would not be convicted of anything more than reckless use of a firearm, or that if he went to trial and lost, the most he would get would be probation.

Defendant's brother, Torinio Patty, testified at the *Ginther* hearing that he heard defendant's trial counsel say to defendant that he could plead and get "two years, plus five years probation." Patty also testified that at no time did he hear defendant's trial counsel advise defendant to take the plea, and that trial counsel had said that defendant should "go to trial because they don't have a case against you and more than likely they got to build a case against you, so we can beat this." Patty also testified that around February or March of 2001, he heard defendant tell his trial counsel that he wanted to take the plea, and that trial counsel replied that the plea "is off the table."

A cousin of defendant's, Jerome Smart, testified at the *Ginther* hearing that he accompanied defendant to every court appearance and heard defendant's trial counsel discuss with defendant whether he should take a plea. Jerome Smart testified that trial counsel told defendant a plea of two years and probation was being offered, that trial counsel advised defendant not to accept the plea "because if they [the prosecution] offer him two years they don't have a case." Jerome Smart testified that he never heard trial counsel tell defendant that the plea offer had to be accepted within a certain time frame. He also testified that he never heard defendant turn down the plea, and that about 1 ½ to 2 months after trial counsel told defendant about the plea offer, and before trial, defendant told trial counsel several times, in Jerome Smart's presence, that he wanted to accept the plea. Trial counsel responded that it was too late.

The trial court determined that trial counsel conveyed the plea offer to defendant, that defendant himself rejected the plea, and that trial counsel's indication to defendant that there may be a chance they could beat the charges given the plea offer of two years for felony-firearm and probation for involuntary manslaughter could be considered trial strategy. The trial court impliedly found that defendant never told trial counsel that he wanted to take the plea. The court's findings make clear that it disbelieved defendant and his relatives in this regard and believed trial counsel. Paying due deference to the trial court's opportunity to observe the witness and assess their credibility, we find no error.

B

Defendant also argues that counsel was ineffective for failing to review evidence and calling defendant as a witness when counsel had not reviewed the 911 tape that was admitted for impeachment purposes. Defendant raised this issue below in his motion for new trial or evidentiary hearing, but it was not explored at the *Ginther* hearing because the circuit court ruled that only one of defendant's issues would be addressed at the *Ginther* hearing—whether the plea offer was properly conveyed to defendant, as discussed above. Defendant also maintains that counsel was ineffective for failing to cross-examine the forensic pathologist and Ellis on the issue whether Ellis properly administered CPR.

With regard to the 911 tape, when defendant took the stand, he denied telling the 911 operator that the victim had shot herself. The prosecutor thereafter played a copy of the 911 tape, which apparently revealed that defendant had in fact told the operator that the victim shot herself. Defendant argues counsel was ineffective for failing to examine the tape before trial and for calling defendant at trial without preparing him to testify. As a result, defendant maintains,

he was called to testify unprepared, and testified that he did not tell the 911 operator that the victim shot herself, only to be impeached with the tape by the prosecution. The record suggests that the 911 tape was not disclosed to trial counsel by the prosecution. However, the record also suggests that trial counsel should have known of the existence of the 911 tape and requested the tape specifically from the prosecution. However, even assuming that the failure to examine the tape was attributable to trial counsel, defendant has not demonstrated the requisite prejudice in light of defendant's admissions that he lied to the police officers that arrived on the scene and that he attempted to cover up his involvement in the shooting. Under these circumstances, where the jury was aware that defendant had given conflicting versions of the events to the authorities (after the 911 calls), we conclude that trial counsel's failure to obtain the 911 tape before trial and failure to prepare defendant to respond to the tape at trial did not cause the requisite prejudice, i.e., defendant has not shown that the result of the proceeding would have been different absent these deficiencies. *Knapp, supra*.

C

Similarly, defendant has failed to demonstrate he was denied the effective assistance of counsel regarding the questioning of Ellis concerning his qualifications to perform CPR. Defendant asserts that the victim may have survived the gunshot wound had she received proper medical treatment, and that it is possible that Ellis administered the CPR improperly and caused the victim further harm. Only grossly negligent treatment of otherwise nonfatal wounds can constitute an intervening cause of death. *Herndon*, *supra* at 399-400. Thus, even if Ellis did administer CPR negligently, that negligence would not serve as a defense for defendant. Therefore, defendant has failed to overcome the presumption that trial counsel's actions were strategic, and we find no error amounting to ineffective assistance of counsel.

Finally, regarding defendant's argument that counsel failed to file responsive pleadings and failed to confer with defendant before waiving witnesses, defendant fails to identify which pleadings were not filed, or what prejudice that had on his case. Similarly, defendant fails to set forth which witnesses were waived without his consultation, and what effect, if any, that had on his case. We find no error amounting to ineffective assistance of counsel.

Docket No. 235622

The prosecution challenges the trial court's downward departure from the minimum guidelines range, asserting that several of the court's reasons were not compelling or substantial.

The statutory guidelines apply to offenses committed on or after January 1, 1999, MCL 769.34(2). Because defendant's crime was committed on December 29, 2000, the statutory guidelines apply. A court is only permitted to depart from the statutory guidelines when it has a "substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); *People v Babcock (After Remand)*, 469 Mich 247, 267; 666 NW2d 231 (2003).

> [T]he Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in a better position to make such a determination and giving this determination appropriate deference. The deference

> that is due is an acknowledgement of the trial court's extensive knowledge of the facts and that court's familiarity with the circumstances of the offender. The Court of Appeals is to conduct the thorough review required by MCL 769.34(11), honoring the prohibition against departures not grounded in a substantial and compelling reason. MCL 769.34(3).
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> "'[T]he existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error.'"
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> " "The determination that a particular [sentencing] factor is objective and verifiable should be reviewed by the appellate court as a matter of law.'"
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> " 'A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion.'" An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.
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> If a trial court articulates multiple "substantial and compelling" reasons for a departure from the guidelines, and the Court of Appeals determines that some of these reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).

[*Babcock (After Remand), supra* at 270, 272-274, citations omitted.]

The guidelines range was 225 to 562 months, thus defendant's fifteen-year minimum sentence (i.e., 180 months) reflected a downward departure from the guidelines range. As required, the trial court noted on the record at sentencing its reasons for departing downward. The court stated that this very sad situation came about because of defendant's failure to exercise restraint while showing the victim the handgun. The court noted that, there having been no witnesses to the shooting, defendant could have chosen not to make a statement to the police, but that he did not take that option and confessed, and that it was his confession that led to his conviction. The court noted that defendant sought help from a neighbor that was medically trained, and that defendant wanted to help the victim. The court noted that although defendant had given false statements to the police, he eventually was "forthcoming." The court also noted that throughout the proceedings, defendant had expressed great remorse.

The trial court completed an SIR Departure Evaluation form, as required. The form asks the sentencing judge to state the "aspects of this case [that] led me to impose a sentence outside the recommended range," under which the court stated:

Substantial and compelling reasons:

1. The defendant sought the aid of a neighbor who was a nurse to attend to the victim shortly after the victim was shot [sic].

2. The defendant panicked and threw away the gun. The neighbor immediately told the defendant to retrieve the gun which the defendant did.

3. When there were no eyewitnesses to the shooting the defendant confessed to the shooting, the victim [sic]. This confession was substantial evidence toward establishing the defendant's guilt.

4. The defendant expressed great remorse [sic] for the victim throughout the court proceedings.

We conclude that the first three reasons stated by the court in the SIR Departure Evaluation form, that he sought the help of a medically-trained neighbor, that he retrieved the gun after the same neighbor said he should, and the fact of defendant's confession, were factual findings that were not clearly erroneous. We cannot agree with the prosecution that the first and second reasons cited by the trial court were not supported by the facts. The prosecution urges that the facts demonstrate that defendant did not go to the neighbor's apartment for the purpose of obtaining medical help, but rather, to hide the gun. Defendant testified that he went downstairs to get help, and the neighbor testified that defendant came to his door, indicated the victim had shot herself and tried to hand him the gun. That different inferences regarding defendant's motivation in going to the neighbor's apartment could be drawn does not change that he did in fact go to the apartment of a medically trained neighbor and advised that the victim was hurt. The court's finding was not clearly erroneous.

Similarly, the prosecution argues there were no facts to support the conclusion that defendant retrieved the gun that he had attempted to hide. We again disagree. The neighbor testified that as he went upstairs to aid the victim defendant fled and said he had to ditch the gun because it was dirty. The neighbor testified that he ordered defendant to get the gun and that defendant did so. The factual finding that defendant retrieved the gun was not clearly erroneous. *Babcock (After Remand), supra.* The factual finding that defendant confessed was also not clearly erroneous.

We conclude that the trial court's determinations that the three reasons cited in the SIR departure form constituted substantial and compelling reasons for departing downward were not an abuse of discretion. As discussed above, although there was sufficient evidence of intent to convict defendant of second-degree murder, a jury may well have convicted him of the lesser offense of involuntary manslaughter given the absence of evidence that defendant intended to harm the victim and absence of evidence of animus between defendant and the victim.

The fourth factor the court relied on, that defendant expressed great remorse throughout the court proceedings, was held as subjective and thus not permissibly taken into account in determining whether to depart from the guidelines in *People v Daniel,* 462 Mich 1, 8; 609 NW2d 557 (2000) (noting that a defendant's expression of remorse is not a permissible factor in determining whether to depart from a minimum statutory sentence, citing *People v Fields*, 448

Mich 58; 528 NW2d 176 [1995]). Cf. *Babcock (After Remand), supra* at 279 (Cavanagh, J., concurring in part and dissenting in part) ("certain factors, such as a defendant's remorse or a defendant's family support [ ] may be considered objective by one sentencing judge and subjective by another.")

We conclude that three of the trial court's four reasons were objective and verifiable and constituted substantial and compelling reasons for departure from the guidelines. We also conclude given the trial court's extensive statements at sentencing that, absent the fourth reason—defendant's remorse--the trial court would have departed to the same degree on the basis of the three substantial and compelling reasons alone. *Babcock (After Remand), supra* at 273.

We affirm in both Docket Nos. 236522 and 239838.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper