STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 246228 Wayne Circuit Court
CURTIS LAVELL KELLY, Defendant-Appellant.	LC No. 02-005841

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent terms of eighteen to thirty years' imprisonment for the second-degree murder conviction and one to five years' imprisonment for the felon in possession of a firearm conviction, both sentences to run consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that there is insufficient evidence to sustain his conviction for second-degree murder. Specifically, defendant claims that there was insufficient evidence to prove that he committed the crime with malice, and without justification or excuse. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution and 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). We are required to draw all reasonable inferences and make credibility determinations in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"The offense of second-degree murder consists of the following elements: '(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "The element of malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *Id.*, quoting *Goecke*, *supra* at 464. Our Supreme Court has stated that "the facts and circumstances of the killing may give rise to an inference of malice." *People v Carines*, 460

Mich 750, 759; 597 NW2d 130 (1999). "Malice for second-degree murder can be inferred from evidence that the defendant 'intentionally set in motion a force likely to cause death or great bodily harm.'" *Mayhew*, *supra* at 125, quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). "The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *Id*. "Malice may also be inferred from the use of a deadly weapon." *Carines*, *supra* at 759.

Here, evidence showed that the victim, Derrick Duncan, was at home with his girlfriend, Delores Aldridge, and their twelve-year-old daughter, Nicole, when defendant came over. Aldridge testified that after hearing "bumping noises," she went into the front room and found defendant standing over Duncan, pointing a gun at him. Defendant let a man named "Unk" into the house, and ordered him to bind Aldridge's hands behind her back with duct tape. Duncan's hands were also duct taped. Defendant fired two shots into the floor and demanded money, eventually taking $700 from Duncan's pocket. Defendant ordered Duncan to tell him where his gun was located, and ordered Unk to retrieve it. After imploring defendant not to hurt Aldridge and Nicole, defendant and Duncan, hands still bound, went upstairs. Aldridge heard "a lot of bumping," and when the two came back downstairs, Aldridge heard three gunshots come from the kitchen. Defendant said "that nigga croaking, let's get outta here," and ran out the front door with Unk. Before Duncan died from a gunshot wound to his leg, he told Aldridge and the police that defendant shot him.

In defendant's statement to the police, he first claimed that he was at Duncan's house to buy drugs, when Duncan pulled a gun on him and demanded money. Defendant maintained that Duncan was the person who fired two shots into the floor, and that when they got into a fight, the gun went off, hitting Duncan. Duncan then dropped the gun, and defendant took it and fled. However, defendant also stated that he "didn't mean to kill [Duncan]," and that he was "just trying to get [Duncan] up off" of him.

Here, defendant's use of a gun can be used to infer malice, i.e., that he intended to kill, cause great bodily harm, or fire a gun in wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause Duncan death or great bodily harm. Although defendant's account of events differed from the accounts of the prosecution witnesses, we must, in considering proofs in a light most favorable to the prosecution, avoid weighing the proofs or determining what testimony to believe. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Rather, we must resolve all conflicts in favor of the prosecution. *Id*. The jury was free to believe the prosecution witnesses' version of events, that defendant did not have a justification or excuse for killing Duncan, and disbelieve defendant's version of events, that Duncan was accidentally shot during their tussle. Because a rational trier of fact could have found that the essential elements of second-degree murder were proven beyond a reasonable doubt, defendant is not entitled to relief on this basis.

Defendant next argues that his due process rights were violated where our Supreme Court's decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), precluded the trial court from instructing the jury on the offenses of voluntary and involuntary manslaughter. We disagree. Defendant was charged with first-degree felony murder, MCL 750.316, and the jury was instructed on that charge, as well as the lesser included offense of second-degree murder, MCL 750.317. However, there is no indication in the record that defendant requested jury

instructions for voluntary and involuntary manslaughter, and a trial court is not required to instruct the jury on necessarily lesser-included offenses, such as voluntary and involuntary manslaughter, unless requested. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991); *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003). Not only did defendant fail to request a voluntary and involuntary manslaughter instruction or challenge the instructions as given, he also expressed satisfaction with the jury instructions as given, thereby waiving the issue on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant also argues that his trial counsel was ineffective for failing to request jury instructions on voluntary and involuntary manslaughter. Defendant failed to move for a new trial or *Ginther*[1] hearing below; therefore, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "A defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id*. at 659. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant claims that his counsel was ineffective for failing to request the trial court to instruct the jury on the necessarily lesser included offenses of voluntary and involuntary manslaughter. *Mendoza*, *supra* at 540-542. Our Supreme Court has held that "when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. at 541. Even assuming, without deciding, that a rational view of the evidence would have supported a jury instruction on voluntary or involuntary manslaughter, defendant did not meet his burden of showing a reasonable probability that, but for the error, the outcome of the proceedings would have been different. That is, defendant did not show the existence of a reasonable probability that, had defense counsel requested and received jury instructions on manslaughter, the jury would have found him guilty of manslaughter instead of second-degree murder. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant has not overcome the presumption that counsel rendered effective assistance. *Rodgers*, *supra* at 714.

Moreover, it is likely that defense counsel determined, as a matter of trial strategy, that he should not request an instruction on the lesser included offenses of voluntary and involuntary manslaughter on the ground that if the jury believed defendant's version of events, it would simply acquit defendant of the charged offense. We decline to second-guess counsel regarding matters of trial strategy, and the fact that a strategy may not have worked does not mandate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The evidence could have supported a finding that defendant broke into Duncan's house, demanded money, and fired a gun at him, resulting in death. Or, the fact finder might have determined that defendant went to Duncan's house to buy

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

drugs, Duncan demanded money from him at gunpoint, and the two men engaged in a struggle during which the gun was fired, hitting Duncan and resulting in death. The jury was entitled to reject the defense theory of the case and to infer from the evidence that defendant fired a gun at Duncan. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Again, defendant has not overcome the presumption that counsel was effective; therefore, he is not entitled to relief on this basis.

Defendant next argues that his due process rights were violated where potentially exculpatory evidence was lost before trial. Specifically, defendant argues that the victim's clothing and photographs of the crime scene may have showed evidence of close-range firing, thereby supporting his version of events that Duncan was shot during their struggle. This Court has held that "[a]bsent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Additionally, "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Id*. Here, defendant does not argue that the evidence was intentionally suppressed or that the police acted in the bad faith. Nor does defendant demonstrate that the evidence was exculpatory. That is, evidence of close-range firing would also be consistent with the prosecution's theory of the case that defendant shot Duncan purposefully. Where, as here, "the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests the results of which might have exonerated the defendant, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police." *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989).

Defendant also argues that the trial court erred in failing to instruct the jury that, because material evidence was not preserved, the jury might infer that the evidence would have been favorable to defendant. However, defendant did not demonstrate that the prosecutor acted in bad faith in failing to produce the evidence. Rather, the evidence simply could not be located. Therefore, the trial court did not err in failing to give an adverse inference instruction. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993).

Additionally, defendant argues that defense counsel's failure to move to dismiss the case based on the loss of potentially exculpatory evidence, and failure to request an adverse inference instruction, amounted to ineffective assistance of counsel. However, because counsel is not ineffective for failure to make a futile motion, defendant is not entitled to relief on this basis. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next argues that the prosecutor engaged in several instances of misconduct. "We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "However, a defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error." *Id*. "In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative." *Id*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant argues that the prosecutor's comments during closing argument that defense counsel did not provide evidence to support the defense theory of the case set out during opening statement, and that a police officer's testimony was the only evidence that supported defendant's version of events, were improper comments on his right not to testify and improperly shifted the burden of proof. However, a prosecutor may observe that defense counsel failed to prove what it said it would in opening statement. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995); *People v White*, 401 Mich 482, 511-512; 257 NW2d 912 (1977). Moreover, defense counsel objected to the prosecutor's statement and the trial court sustained the objection; therefore, defendant was not prejudiced by the prosecutor's comment and reversal is accordingly not required. Defendant also argues that the prosecutor's comment during rebuttal that defense counsel failed to explain the defense version of events amounted to misconduct. However, a prosecutor may observe that the evidence against defendant is undisputed. *Fields*, *supra* at 115. Therefore, because the comment did not constitute error, defendant is not entitled to relief on this basis.

Defendant next argues that the prosecutor's comment on rebuttal that defense counsel was intentionally trying to mislead the jury amounted to misconduct. Defense counsel did not object to this remark; therefore, defendant must demonstrate outcome-determinative plain error in order to avoid forfeiture of this issue. *Carines*, *supra* at 763. "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Watson*, *supra* at 592. Here, while the prosecutor's comments did suggest that defense counsel was trying to distract the jury from the truth, the comments must be considered in light of defense counsel's comments. *Id*. at 592-593. "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id*. at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, the prosecutor's comments were made in rebuttal to defense counsel's closing argument, in which defense counsel emphasized the lack of evidence presented by the prosecution concerning its contention that the front door had been kicked in by defendant, and the prosecutor's failure to explain what happened to the duct tape used to bind the victim and his girlfriend. Defense counsel suggested that the lack of such evidence amounted to the prosecution failing to meet its burden of proving defendant's guilt beyond a reasonable doubt. However, such evidence was merely probative of defendant's guilt, and need not have been proven beyond a reasonable doubt for the jury to find defendant guilty of the crimes with which he was charged. Therefore, it was not improper for the prosecutor to respond to defense counsel's comments by emphasizing that such evidence, despite defense counsel's argument to the contrary, was merely probative and was not critical to a finding of guilt beyond a reasonable doubt. Therefore, reversal is not required, especially in light of defendant's failure to object.

Defendant next argues that the prosecutor improperly denigrated defense counsel when he stated that defense counsel wanted the jury to believe that the victim was a person that society could afford to lose. Defense counsel did not object to this remark; therefore, defendant must demonstrate outcome-determinative plain error in order to avoid forfeiture of this issue. *Carines*, *supra* at 763. It is true that a prosecutor may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). However, the prosecutor's comment here "cannot reasonably be construed as a personal attack on defense counsel." *Id*. Rather, the prosecutor's comment that defense counsel wanted the jury to acquit defendant because the victim deserved to die amounted to mere speculation about the defense theory of the

case. In light of the fact that a prosecutor can properly comment on the weakness of a defense theory, and the fact that defense counsel never conveyed such an argument to the jury, we do not believe the prosecutor's comment amounted to plain error affecting defendant's substantial rights; therefore, the issue is forfeited.

Defendant next argues that the prosecutor improperly argued facts not in evidence when he stated that the fact that there were no photographs from the crime scene was due to a police "screw-up." Defense counsel objected to the prosecutor's comment on the ground that there was no testimony to support it, but the prosecutor argued that "common sense" dictates that the absence of photographs equated with the police being derelict in their duties. Defense counsel responded that, to the contrary, "common sense" dictates that the police were trying to hide something. The prosecutor then responded that "as an officer of the court, if [he] knew something, it would be [his] duty to bring it forward." The trial court sustained defense counsel's objection, on the ground that the prosecutor should not have argued something not in evidence. While it is true that a prosecutor may not "argue the effect of testimony that was not entered into evidence at trial," *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), and that "it is error for the prosecutor to place the prestige of his office or the police behind the contention that a defendant is guilty," *People v Lucas*, 138 Mich App 212, 221; 360 NW2d 162 (1984), defense counsel objected to the prosecutor's comments, and the trial court sustained the objection. Therefore, defendant was not prejudiced by the prosecutor's comments and reversal is accordingly not required.

Finally, defendant argues that evidence that he was questioned in the instant case while being held for another charge, although elicited through the nonresponsive answers of a police officer on cross-examination by defense counsel, somehow amounted to prosecutorial misconduct. However, because such evidence was indeed elicited by defense counsel, defendant's claim of prosecutorial misconduct on that basis is wholly without merit.

"Defendant claims that the cumulative effect of the various instances of alleged prosecutorial misconduct requires reversal." *Watson*, *supra* at 594. "The key test in evaluating claims of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Id*. However, as noted above, none of the alleged instances of prosecutorial misconduct denied defendant a fair and impartial trial; therefore, reversal is not warranted.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra