# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 23, 2004 |
| v | No. 249954<br>Wayne Circuit Court |
| ROBERT DIXON,<br><br>Defendant-Appellant. | LC No. 03-003317 |

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317 and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to fifteen to thirty years in prison for the second-degree murder conviction and two consecutive years for the felony-firearm conviction. We affirm.

## I. Basic Facts

In December 2002, Detroit police officers responded to a radio run to investigate a shooting incident at defendant's business. Upon arrival, the investigating officers discovered that the lights were on and the doors were locked from the inside. Through a window, a female could be seen lying on the floor. After the police knocked for a while, defendant answered the door. The officers entered the building and noticed the victim was bleeding from her neck. When the police asked what happened, defendant indicated that he was playing with his gun when it discharged twice. Defendant had blood on his clothing and was intoxicated. A .38 caliber revolver was recovered from the scene. At trial, defendant offered as his defense that the shooting was an accident that occurred when he dropped his gun. The prosecution presented expert testimony that the gun would not discharge after being dropped while cocked. The jury found defendant guilty as charged.

## II. Effective Assistance of Counsel

Defendant contends that he was denied the effective assistance of counsel. This issue presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

determinations are reviewed de novo. *Id*. "[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he 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." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302.

A. Instruction on Lesser Offense of Manslaughter

Defendant first argues that he was denied the effective assistance of counsel because defense counsel, rather than requesting an instruction for the lesser offense of manslaughter, objected when the prosecution requested that instruction.

Defendant's trial took place after our Supreme Court decided *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). According to *Cornell,* only a necessarily included lesser offense (an offense whose elements are completely subsumed in the greater offense) could be considered by the jury as an "inferior" offense under MCL 768.32. *Id.* at 353-357. According to *People v Van Wyck*, 402 Mich 266, 269; 262 NW2d 638 (1978), manslaughter was not a necessarily included lesser offense of murder. After defendant's conviction, however, our Supreme Court decided *People v Mendoza*, 468 Mich 527, 533-; 664 NW2d 685 (2003), in which it overruled *Cornell* and *Van Wyck*, holding that when a defendant is charged with murder, an instruction for manslaughter must be given if supported by the evidence because manslaughter is a necessarily included lesser offense of murder.

Thus under existing law at the time of defendant's trial for second-degree murder, an instruction on manslaughter would not have been appropriate. Trial counsel will not be deemed ineffective for failing to advocate a meritless position or failing to bring a fruitless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, considering defendant's accident theory of defense, defense counsel's strategy of declining the lesser offense instruction was a legitimate strategy that we will not second guess. "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982).

B. Defendant's Statement to Police at the Scene

Defendant also argues that defense counsel was ineffective because he failed to move to suppress defendant's statement to the police at the scene. But defendant was not entitled to *Miranda*[1] warnings before he uttered the statement. "[A] police officer may ask general on-the-scene questions to investigate the facts surrounding the crime without implicating the holding in *Miranda.*" *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). When the police

[1] *Miranda v Arizona*, 384 US 426; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

officers entered the scene, they "naturally and spontaneously" asked what had happened. Defendant was not in custody. *Id.* In any event, allowing defendant's exculpatory statement to be admitted was clearly a strategic choice; the defense theory offered was that defendant accidentally shot the victim. That defense counsel's trial strategy was unsuccessful does not in and of itself not constitute ineffective assistance of counsel. *People v Kevorkian,* 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood