STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2008
v	No. 273234 Muskegon Circuit Court
EDDIE RYAN LEWIS, a/k/a EDWARD LEWIS, Defendant-Appellant.	LC No. 06-052984-FC

Before: Wilder, P.J., Saad, C.J., and Smolenski, J.

PER CURIAM.

Defendant Eddie Ryan Lewis appeals as of right his jury trial convictions for one count of first-degree felony murder, MCL 750.316(1)(b); one count of second-degree murder, MCL 750.317; and two counts of possession of a firearm during the commission of a felony, MCL 750.227(b). The trial court sentenced defendant to life imprisonment for first-degree felony murder, 25 to 50 years' imprisonment for second-degree murder, and two years' imprisonment for each of the felony-firearm convictions, with credit for 190 days served. We affirm in part, but vacate defendant's sentences for second-degree murder and one count of felony-firearm.

Defendant first argues that the trial court erred by denying his request to instruct the jury about self-defense, manslaughter, and duress. The trial court's determination whether a requested jury instruction is applicable to the facts of a case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Even if there is error, reversal is only warranted if defendant can establish that the error caused a miscarriage of justice, which means that it is more likely than not that the error was outcome determinative, and the error undermined the reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006).

Duress is an affirmative defense based on the rationale that, as a matter of social policy, it is better that the defendant choose to violate the criminal law in order to avoid the greater evil threatened by the other person. *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). However, in general, duress is not a defense to homicide. *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998). To properly raise the defense, a defendant has the burden of producing some evidence of the following elements:

> A) The threatening conduct was sufficient to create the fear of death or serious bodily harm, in the mind of a reasonable person;

> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress operated on the mind of the defendant at the time of the crime; and
>
> D) The defendant committed the act to avoid the threatened harm. [*Lemons*, *supra* at 247.]

Moreover, the threatening conduct must be present, imminent, and impending; a threat of future injury is not sufficient to support the defense of duress. *Id*. If a defendant does not submit sufficient evidence to warrant a finding of duress, the trial court is not required to instruct the jury on that defense. *Id*. at 248.

Even if we were to conclude that duress could constitute an indirect defense to felony murder, no rational view of the evidence supported that defendant acted under duress. The evidence failed to show that defendant was faced with a present, imminent threat of injury at the time he committed these offenses. Defendant's statements to the police indicated that, at most, the codefendant who planned the robbery made threats of future injury, not imminent, impending injury. Therefore, the trial court properly declined to instruct the jury about duress.

The trial court also properly declined to instruct the jury about self-defense. When a defendant requests a jury instruction on self-defense that is supported by the evidence, the trial court is required to give the instruction. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). A person is justified in using deadly force against another in self-defense if, under the totality of the circumstances, the person honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. *Id.* at 142. Here, defendant failed to offer any evidence that he honestly and reasonably believed that he was in danger of being killed or seriously injured, and that it was immediately necessary to exercise deadly force to protect himself. Defendant acted as the aggressor by entering the victim's house and attempting to commit an armed robbery, and a defendant may not claim self-defense if he used excessive force or was the initial aggressor. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993).

The trial court also properly refused to instruct the jury on manslaughter. We review de novo the trial court's decision whether to instruct a jury on a necessarily included offense. *People v Tommy Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005). Both voluntary and involuntary manslaughter are necessarily included lesser offenses of murder, distinguished by the element of malice. *People v Mendoza*, 468 Mich 527, 533-534, 540-541; 664 NW2d 685 (2003). "Consequently, 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. Defendant has not demonstrated that a rational view of the evidence supported an instruction on either voluntary or involuntary manslaughter.

To show voluntary manslaughter**,** a defendant is required to show that he killed in the heat of passion, that the passion was caused by adequate provocation, and that there was not a lapse of time during which a reasonable person in defendant's position could have controlled his passions. *Id*. at 535. The degree of provocation that defendant was required to demonstrate to

mitigate his offense from murder to manslaughter is the degree of provocation that would cause defendant to act out of passion rather than reason, and that which would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). In *People v Maclin*, 101 Mich App 593, 596; 300 NW2d 642 (1980), we rejected the idea that a robbery victim's attempted self-defense can be viewed as sufficient provocation to reduce murder to manslaughter. Here, the evidence presented at trial did not support that defendant was provoked to act out of passion rather than reason. Defendant shot the victim in the victim's house, during the course of an armed robbery. The victim was sleeping before defendant entered the bedroom with a weapon. Defendant did not present any evidence that the victim or the victim's wife engaged in any provocation sufficient to mitigate the murder to manslaughter.

In contrast to voluntary manslaughter, involuntary mansalughter does not involve a deliberate killing. Instead, involuntary mansalughter is "the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent ommission to perform a legal duty." *Id.* at 536. Because defendant clearly killed the victim during the commission of a felony, he was not entitled to an involunatry manslaughter instruction. Therefore, the trial court did not plainly err in not instructing the jury on either voluntary or involuntary manslaughter as a lesser-included offense of murder. *Mendoza, supra* at 547-548.

Defendant next argues that the trial court committed plain error by granting the prosecutor's request to modify the language of the standard jury instruction relating to the predicate felony for the crime of felony murder. Defendant argues that the trial court's instructions, which replaced the phrase "must prove" with the phrase "would have to prove," unfairly reduced the prosecutor's burden of proof regarding the elements of the crime of first-degree felony murder, by replacing mandatory language with passive language. While defendant's trial counsel arguably waived this issue by agreeing to the modified instruction at trial, we choose to review the issue because defendant argues on appeal that counsel's actions regarding this instruction constituted ineffective assistance of counsel. We review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error will only warrant reversal when it affected defendant's substantial rights and resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763, 774. We conclude that the modified instruction did not amount to plain error.

"To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed on the prosecutor and what constitutes reasonable doubt." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). The instruction properly informed the jury that the prosecutor was required to prove the elements of the charged offense beyond a reasonable doubt, and therefore, defendant has failed to show plain error.

Defendant next argues that he was denied the effective assistance of counsel through numerous actions of his trial counsel, specifically allowing defendant to attend a March 15, 2006 interrogation without counsel; failing to properly suppress defendant's statements to the police; failing to file a witness list before trial, failing to object to prejudicial testimony from defendant's wife; failing to cite beneficial precedent to support a motion to instruct the jury about self-

defense, duress, or manslaughter; and failing to object to the trial court's multiple sentences for the same homicide imposed upon defendant. Because there was no *Ginther*[1] hearing, our review of these claims of error is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Whether defendant had the effective assistance of counsel is a question of law, which we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id*. at 302.

On the record before us, we cannot conclude that defendant was denied the effective assistance of counsel before or during his trial. We have already determined that the trial court properly instructed the jury. Defendant's trial counsel will not be deemed ineffective for failing to convince the trial court to take an erroneous position. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Further, defendant was not precluded from calling any witnesses because of an untimely or informal witness list, and defendant cannot show that any of the other alleged errors resulted in prejudice. Indeed, even if defendant's trial counsel unreasonably failed to appear at the March 15, 2006 interrogation, defendant had already confessed in the February 28, 2006 statement. There has been no showing that, but for counsel's conduct, the result of the trial would have been different. *Toma*, *supra* at 302-303.

However, we find merit to defendant's claim that his counsel was ineffective for failing to raise the double jeopardy issue at sentencing. Defendant argues that he was denied his Fifth Amendment right to be free from multiple punishments for the same crime, when he was convicted of first-degree felony murder and second-degree murder for the death of one victim. We agree. This Court has previously determined that "multiple murder convictions arising from the death of a single victim violate double jeopardy." *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). Consequently, defendant's conviction for second-degree murder and the corresponding conviction for felony firearm must be vacated.

Next, defendant argues in a supplemental brief that the trial court abused its discretion by denying defendant's pretrial request for substitution of counsel. The Sixth Amendment affords criminal defendants the right to retain counsel of their own choosing. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). However, the constitutional right to counsel of one's choice is not absolute. *Id*. at 557. Thus, an indigent person who is entitled to appointed counsel is not entitled to choose his own lawyer. *People v Russell*, 471 Mich 182, 192 n 25; 684 NW2d 745 (2004). Further, appointment of substitute counsel is predicated on a showing of good

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

cause, as well as a showing that substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). In this case, defendant did not show a genuine issue over the use of a substantial defense or fundamental trial tactic, which would have warranted substitute counsel. Defendant merely asserted that he disagreed with his trial counsel over the decision to waive his preliminary examination, and believed counsel should have done more to assist him with the March 15, 2006 interrogation. Defendant's allegations do not rise to the level that would require the trial court to grant defendant's request for the substitution of counsel.

We affirm defendant's convictions and sentences for first-degree felony-murder and one count of felony-firearm, but vacate defendant's convictions and sentences for second-degree murder and the corresponding conviction for felony firearm.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski