Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI v JAMES DOMNICK-DOUGLAS PIERSON

Docket No. 279653

LC No. 06-002346-FC

Joel P. Hoekstra
Presiding Judge

William C. Whitbeck

Michael J. Talbot
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued November 25, 2008 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 23 2008
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2008
v	No. 279653 Kent Circuit Court
JAMES DOMNICK-DOUGLAS PIERSON, Defendant-Appellant.	LC No. 06-002346-FC

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to consecutive sentences of 27 to 50 years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Because we conclude that the trial court did not err in denying defendant's motion for a directed verdict, in excluding Steven Chevis's out-of-court statement, in failing to instruct the jury on imperfect self-defense and voluntary manslaughter, or in sentencing defendant based on facts not found by the jury, and because defendant was not denied the effective assistance of counsel, we affirm.

I

Defendant first claims that the trial erred in denying his motion for a directed verdict because the prosecution failed to provide sufficient evidence of malice aforethought and failed to provide sufficient proof to exclude a claim of imperfect self-defense. We disagree. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

[1] Defendant was acquitted of felony murder, MCL 750.316(1)(b), and his conviction for conspiracy to commit second-degree murder, MCL 750.157a, was vacated by the trial court.

The elements of second-degree murder are "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Defendant only argues that the prosecution failed to provide sufficient evidence of malice. Malice is "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." *People v Goecke*, 460 Mich 750, 758; 597 NW2d 130 (1999). Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm, and it also may be inferred from the use of a deadly weapon. *Id.* at 759.

Defendant was charged with second-degree murder on an aiding and abetting theory. "The requisite intent for conviction of a crime as an aider and abettor is that necessary to be convicted of the crime as a principal." *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001) (quotation marks and citation omitted). An aider and abettor's state of mind may be inferred from the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).

The prosecution presented evidence that defendant specifically told Daniel Frazier and Andy Tramper to lead him to the house of Gordie Dawson, the victim. After arriving at Dawson's house, defendant angrily made his way into the house with a gun and confronted Dawson about a food stamp card that Dawson had traded for drugs. Defendant threatened to kill Dawson and everyone in the house if Dawson did not pay him. After Stephen Chevis walked into Dawson's house, defendant, who had received some of the money, gave Chevis the gun and said, "If anybody tries anything, shoot 'em." The prosecution also presented evidence that defendant later ordered Chevis to shoot Dawson. After defendant hit Dawson with a crutch and Dawson retaliated, defendant yelled, "Blast him, blast him." Chevis shot Dawson in the head. This evidence, when viewed in a light most favorable to the prosecution, could persuade a rational trier of fact that defendant had 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 of cause death or great bodily harm. *Goecke*, *supra*; *Aldrich*, *supra* at 101.

Defendant also argues that there was insufficient proof to exclude a claim of imperfect self-defense. However, when defendant moved for a directed verdict, he never claimed that he was entitled to a directed verdict on the basis that the prosecutor presented insufficient evidence to exclude the possibility that he acted in self-defense. Moreover, defendant never presented a theory of imperfect self-defense at trial. While there may have been evidence to support a claim of imperfect self-defense, it would have been inappropriate for the trial court to grant defendant a directed verdict based on a theory that was never advanced. See *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999) (the defendant was not entitled to a jury instruction on imperfect self-defense when the defendant never advanced the theory at trial). Defendant was not entitled to a directed verdict on the second-degree murder charge.

II

Defendant next claims that he received ineffective assistance of counsel. Because defendant did not move for a new trial or a *Ginther*[2] hearing, our review of defendant's claim is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on his claim, defendant must show that defense counsel's performance fell below an objective standard of reasonableness and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Unger*, 278 Mich 210, 242; 749 NW2d 272 (2008).

First, defendant contends that counsel's performance was deficient when, before trial, he failed to discover the notes and photographs relating to Tramper's photographic identification of him. The notes revealed that Tramper was only 70 percent sure of the identification. Defense counsel may be found to have rendered ineffective assistance when unprepared for trial. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). However, to succeed on such a claim, a defendant must demonstrate "that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited" his case. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 581 NW2d 1 (1997), vacated in part on other grounds 457 Mich 866 (1998). Defendant has failed to demonstrate that counsel's failure to discover the information regarding Tramper's photographic identification of defendant before trial resulted in an absence of evidence that would have been valuable to his case. Counsel was permitted to speak with Tramper before Tramper testified, and during cross-examination of Tramper, counsel questioned Tramper about the photographic lineup and his identification of defendant. Moreover, defendant has not identified any evidence beneficial to his case that counsel would have discovered had counsel known of Tramper's identification of defendant.

Second, defendant claims that counsel was ineffective for conceding the "intent to kill" element during closing arguments. During closing arguments, defense counsel, when explaining the elements of first-degree murder, asked, "Does anybody suggest that someone didn't intend to kill Gordon Dawson?" Defense counsel then said, "Well, clearly that's true." A concession can render defense counsel's performance ineffective; however, "it is only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel." *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Counsel's statement was consistent with the defense theory of the case, which was that defendant was innocent of killing Dawson. Defendant testified that he was involved in a fight with Dawson when Chevis came in and shot Dawson three times. Defendant further testified that he did not have a gun when he walked into Dawson's house and that he did not order Chevis to shoot Dawson. Accordingly, counsel's statement that whoever killed Dawson intended to kill him was not any concession, much less a complete concession, of defendant's guilt. Counsel's decisions about which theories to argue at trial are matters of trial strategy that this Court will not second-guess. *People v Julian*, 171 Mich App 153, 157; 429 NW2d 615 (1988).

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

Third, defendant argues that defense counsel was ineffective for failing to request jury instructions on imperfect self-defense and voluntary manslaughter. "Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter." *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).[3] Counsel's decision to request or refrain from requesting a lesser offense instruction is typically a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). Here, instructions on imperfect self-defense and voluntary manslaughter would have been contrary to defendant's theory at trial, which, as stated *supra*, was that defendant was innocent of killing Dawson. Defendant was not attempting to excuse any criminal conduct. Defendant testified that he did not know that Chevis had a gun and that he did not order Chevis to shoot Dawson. "The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Defendant was not denied the effective assistance of counsel.

III

Defendant also argues that the trial court erred in excluding Chevis's out-of-court statement, made to Starla Pierson, defendant's sister, that he shot Gordon because Gordon was beating up defendant. We disagree.

A trial court's ultimate decision to admit or exclude evidence under MRE 804(b)(3) is reviewed for an abuse of discretion. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). A statement is admissible under MRE 804(b)(3), if (1) the declarant is unavailable, (2) the statement was against penal interest, (3) a reasonable person in the declarant's position would have believed the statement to be true, and (4) corroborating circumstances indicated the trustworthiness of the statement. *Id.* The determination whether a statement was against the declarant's penal interest is a question of law reviewed de novo. *Id.* A statement is against a declarant's penal interest if the statement "so far tended" to subject the declarant to criminal liability. MRE 804(b)(3). This means that the statement must be probative of an element of a crime in a trial against the declarant, and a reasonable person in the declarant's position would have realized the statement's incriminating element. *Barrera*, *supra* at 272.

After it called Starla as a witness, but before direct examination, the prosecution asked the trial court to prevent defense counsel from questioning Starla about statements Chevis made to her. Defense counsel informed the trial court that Chevis told Starla that he shot Dawson because Dawson was beating up defendant. Before deciding whether Chevis's statement qualified as a statement against penal interest, the trial court had Starla testify outside the presence of the jury. Starla testified that Chevis told her that he shot Dawson after seeing defendant on the ground being beaten by Dawson. Sharla further testified that, when she asked Chevis why he shot Dawson more than once, Chevis answered that he could not beat up Dawson. The trial court ruled that Chevis's out-of-court statement was not admissible under MRE

[3] Our Supreme Court has not recognized the doctrine of imperfect self-defense. *Posey*, *supra* at 960. However, "panels of this Court have recognized the doctrine." *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993).

804(b)(3) because the statement offered a defense for the shooting, thereby "reduc[ing] the whole idea of it being a statement against interest."

Self-defense, which includes the right to defend another, is a complete defense to an otherwise intentional homicide. *Riddle, supra* at 126; *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). By stating that he shot Dawson because Dawson was beating up defendant, Chevis's statement to Starla was his attempt to explain that the shooting was necessary for Dawson's protection. As such, the statement did not tend to subject Chevis to criminal liability, but instead raised the complete defense of defense of others. Accordingly, the statement is not against Chevis's penal interest. See *United States v Shryock*, 342 F3d 948, 981 (CA 9, 2003) (the declarant's statement that he shot the victim in self-defense was not against his penal interest). Because Chevis's statement was not against his penal interest, the trial court did not abuse its discretion in excluding the statement.[4]

IV

Defendant next argues that the trial court erred in failing to give an imperfect self-defense instruction. However, defendant failed to object to the jury instructions and indicated approval of the instructions as given. Therefore, the issue is waived. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Regardless, defendant was not entitled to such an instruction because he had not advanced an imperfect self-defense theory at trial. *Posey, supra*.

V

Defendant finally claims that, pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), he was denied his Sixth Amendment, US Const, Am VI, right to a jury trial and Fourteenth Amendment, US Const, Am XIV, right to due process because the trial court enhanced his sentence based on facts not found by a jury beyond a reasonable doubt. However, our Supreme Court has determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme, in which a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 160-164; 715 NW2d 778 (2006). Accordingly, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 160. Defendant's assertion that his sentence was improperly enhanced in violation of his constitutional rights is without merit.

[4] We reject defendant's assertion that the exclusion of Chevis's statement violated his constitutional right to present a defense. A rule of evidence does not violate a defendant's right to present a defense as long as the rule is not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Unger, supra* at 250 (quotation marks and citations omitted). Defendant has made no argument that MRE 803(b)(4) is arbitrary or disproportionate to the purposes it is designed to serve.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot