

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WILLIAM VRONKO II,

Defendant-Appellant.

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UNPUBLISHED  
February 12, 2009

No. 279857  
Kent Circuit Court  
LC No. 06-007125-FC

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for involuntary manslaughter, MCL 750.321. Defendant was sentenced to 5-½ to 15 years' imprisonment with credit for 357 days. We affirm.

Defendant first argues on appeal that his claim of self-defense provided a complete defense and should have resulted in exoneration of any charges above a simple assault and battery. Defendant's argument requires our review of the sufficiency of the evidence to sustain the manslaughter conviction. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

To support a conviction for involuntary manslaughter in this case, it was necessary for the prosecutor to prove that: 1) defendant caused the death of Jim Whiting; 2) defendant intended some injury or, even if injury was not intended, what occurred amounted to gross negligence, and 3) the act was without legal justification or excuse and thus not self-defense. *In re Gillis*, 203 Mich App 320, 321; 512 NW2d 79 (1994); see also CJI2d 16.10. The elements of self-defense include: 1) defendant was not the aggressor or, if defendant was the aggressor, defendant communicated that the fight was over and withdrew, 2) defendant honestly and reasonably believed that he was in immediate danger of death or serious injury, 3) defendant honestly and reasonably believed that he must act then and there to fend off death or serious

injury and that defendant could not have left or stepped away, and 4) defendant's response was reasonable, i.e., whatever defendant did was, under the circumstances as they appeared to him, no more than necessary to prevent Whiting from killing or seriously injuring him. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985); see also CJI2d 7.15.

The evidence supports the conclusion that defendant hit Whiting several times in the face and that after the first blow, defendant fell backwards and hit his head on a piece of cement. Whiting subsequently died of craniocerebral trauma or head injury. Therefore, defendant clearly caused Whiting's death. Further, intent may be proved from the facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Because defendant repeatedly punched Whiting in the face after he fell, a rational trier of fact could conclude beyond a reasonable doubt that defendant intended to injure Whiting. Even if the injury was not intended, defendant's continuing to beat Whiting could be determined gross negligence. *People v Trotter*, 209 Mich App 244, 249; 530 NW2d 516 (1995); *In re Gillis*, *supra* at 322.

A rational trier of fact could also find that the prosecutor proved that defendant did not act in self-defense. The evidence supported a rational trier of fact in finding beyond a reasonable doubt that defendant was the aggressor. He threw the first punch knocking Whiting to the ground and continued beating him. Although a jury could find that Whiting was the aggressor by allegedly threatening defendant with a knife, the jury, in this case, may have disregarded the alleged threat finding defendant's version of events not credible. This Court must not interfere with a jury's determination regarding the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, a jury could find that defendant could have retreated by letting Whiting know he was leaving, turning around and exiting with his girlfriend, or climbing over a nearby car to retreat. And, Whiting never threw any punches or even pulled the knife out of his pocket. Therefore, a rational trier of fact could find that it was unlikely that defendant honestly and reasonably believed that he was in immediate danger of death or serious injury. Accordingly, self-defense was not a complete defense on the facts of this case. Viewed in a light most favorable to the prosecution, the prosecution presented sufficient evidence from which a rational trier of fact could find that the elements of involuntary manslaughter were established beyond a reasonable doubt.

Defendant next argues that the trial court erred when it refused to reinstruct the jury that the prosecutor had the burden to prove beyond a reasonable doubt that defendant did not act in self-defense. Claims of instructional error are reviewed de novo. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "Instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred." *Id.* In this case, the trial court articulated to the jury the elements of involuntary manslaughter and self-defense as provided in Criminal Jury Instructions 16.10 and 7.15. Jurors are presumed to follow their instructions. *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001). The instruction on involuntary manslaughter provided that the prosecutor must prove beyond a reasonable doubt that the act was not justified and thus not done in self-defense. CJI2d 16.10. The trial court subsequently reiterated to the jury that it needed to be proved beyond a reasonable doubt that defendant's conduct was not justified. Thus, the burden was clearly placed on the prosecution to prove that the conduct was not justified, i.e. that defendant did not act in self-defense. The trial

court did not err when it refused to reinstruct the jury because the jury instructions read as a whole indicated that it was the prosecutor's burden to prove that defendant did not act in self-defense.

Defendant next argues that his defense counsel was ineffective for not producing Whiting's knife, which was recovered and returned to Whiting's family, and for not having the tape of defendant's interview with a radio host played in full at trial. Defendant alleges the tape would show that he demonstrated to the radio host how Whiting reached for his knife. To establish ineffective assistance of counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *Rodgers, supra* at 714.

We find that counsel was not ineffective for failing to produce the knife at trial and for not having the complete tape of defendant's interview with a radio host played in court. Ample testimony at trial asserted defendant's theory of the case, specifically, that he acted in self-defense after being threatened with a knife. Thus, the missing evidence would not have added anything of substance to defendant's case. Further, defense counsel's decisions regarding what evidence to present, whether to call witnesses, or how to question witnesses are all presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We will neither substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant also argues that his counsel was ineffective for failing to call two witnesses who could verify that defendant told them that Whiting threatened him with a knife. The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Dixon, supra* at 398. A substantial defense is a defense, which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Because defendant's theory of the case was actually raised and amply covered by defendant's evidence, defendant was not deprived of this defense by the absence of the witnesses. *Dixon, supra*. Thus, there is no reasonable probability that the results of defendant's trial would have been different but for defense counsel's failure to call the witnesses. Consequently, defendant was not denied the effective assistance of counsel. *Rodgers, supra*.

Defendant next argues that the prosecution violated his rights to due process and discovery pursuant to MCR 6.201 by not producing the knife as exculpatory evidence. This unpreserved claim of constitutional error is reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Although a criminal defendant does not have a constitutional right to discovery, he does have a due process right to obtain evidence that is favorable to him and material to his guilt or punishment. *People v Stanaway*, 446 Mich 643; 664-666; 521 NW2d 557 (1994). The Court in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

While the knife might have been evidence favorable to defendant, the “[f]ailure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown.” *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). The record does not support the existence of bad faith on the part of law enforcement. In addition, there is no reasonable probability that the outcome of the trial would have been different had the knife been produced at trial because evidence that the knife existed was admitted at trial and in fact a photo of the knife was admitted into evidence. *Cox, supra* at 448. There was no due process violation. Furthermore, defendant has failed to show that the prosecution committed misconduct requiring reversal with regard to his right to discovery pursuant to MCR 6.201. The error did not affect defendant’s substantial rights because it did not affect the outcome of the trial where ample evidence regarding the knife and theory of defense was presented to the jury.

Defendant finally argues that his sentence is invalid because it was not individualized. Defendant asserts the trial court said little to explain its sentence other than it felt that the guidelines were too lenient. In addition, defendant argues that even though a sentence is within the guidelines, it still may not be proportional. Unless there was an error in scoring or reliance on inaccurate information, we must affirm defendant’s sentence, because it was within the guidelines range. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 268, 272; 666 NW2d 231 (2003). Moreover, a sentence within the sentence guidelines is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant does not allege a scoring error and the record does not support the allegation that the trial court relied on inaccurate information in sentencing defendant. Therefore, we affirm defendant’s sentence.

We affirm.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Stephen L. Borrello