STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2009
v	No. 282323 Kalamazoo Circuit Court
JUSTIN ALLEN SCHNEIDER, Defendant-Appellant.	LC No. 06-002149-FC

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), for which he was sentenced to life imprisonment without parole. In addition, defendant was ordered to pay $1,715 in restitution for attorney fees. Defendant appeals as of right. We affirm.

Defendant argues that the prosecutor improperly commented and elicited testimony concerning his in-custody silence. We review unpreserved constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" US Const, Am V. However, silence is not constitutionally protected when it is not in reliance on the *Miranda*[1] warnings and did not occur during a custodial interrogation. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992). "'[I]nterrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998) (citation omitted). Moreover, there must be some nexus between the custody and the interrogation in order for *Miranda* to apply. *People v Herndon*, 246 Mich App 371, 396; 633 NW2d 376 (2001).

Defendant was arrested on August 10, 2002, for a traffic offense and spent time in police custody at that time. Later, in October 2006, defendant was again arrested, this time for Karen Sanders' murder. At his second arrest, defendant was read his *Miranda* warnings and signed a waiver. Defendant was not interrogated after his arrest for the traffic offense; therefore, defendant's silence was not constitutionally protected because it was not in reliance on the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Miranda warnings and did not occur during a custodial interrogation. *Schollaert*, *supra* at 166-167. Defendant was certainly in police custody; however, defendant's silence concerning Sanders was not the result of an interrogation because the police never expressly questioned him or attempted to elicit a response from him. *Marsack*, *supra* at 374. In addition, there was no nexus between defendant's custody for the traffic offense and Sanders' murder. Therefore, *Miranda* did not apply, and the prosecution could properly comment on defendant's silence at the time of his first arrest. Moreover, the prosecution's use of defendant's silence at the time of the first arrest was permissible because the prosecution was merely responding to defendant's argument that he had killed Sanders in self-defense. See *People v Fields*, 450 Mich 94, 110-112; 538 NW2d 356 (1995).

Defendant next argues that he was denied his right to be present during all critical stages of his trial. We review unpreserved constitutional issues for plain error affecting substantial rights. *Carines*, *supra* at 763-764. As our Supreme Court observed in *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984):

> A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected.

Waiver of this right cannot be presumed when the record is silent. *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). However, a defendant's absence from a part of his trial only warrants reversal if "there was any reasonable possibility that defendant was prejudiced by his absence." *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

Defendant had a right to be present during the four proceedings because they were critical stages of the criminal proceedings. Although defense counsel purported to waive defendant's right to be present, we cannot presume that this waiver was valid. We will not presume that defendant validly waived his right to be present where the record is silent concerning whether defendant's absence was knowing and voluntary. *Armstrong*, *supra* at 129-130. Three of the proceedings occurred during jury selection, and the fourth proceeding concerned a juror's removal during jury deliberations. All of the challenged proceedings are critical stages, and defendant thus had a right to be present. *Mallory*, *supra* at 247. Defendant's absence without a valid waiver was plain error. However, defendant has failed to establish that he was prejudiced by his absence from the four challenged proceedings. During each of the challenged proceedings, defendant was represented by counsel. In addition, the three proceedings that took place during jury selection merely removed potential jurors for hardship or for possible bias against defendant. In the fourth proceeding, jury deliberations were halted as a hearing was held to determine whether Juror number 13 should be removed from the jury because he indicated to another juror that he was planning to research the issue of premeditation before returning for the second day of deliberations. The trial court "erred on the side of caution" and excused Juror number 13 for failing to follow the trial court's instructions. When defendant rejoined the proceedings, he was permitted to move for a mistrial after learning the substance of the hearing with Juror number 13. Therefore, we cannot conclude that defendant was prejudiced by his absence from the hearing. Because the challenged proceedings did not prejudice defendant's substantial rights, any error was harmless. See *Armstrong*, *supra* at 129.

Defendant next argues that there was insufficient evidence of premeditation and deliberation to support his conviction of first-degree premeditated murder. We "'must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.'" *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citation omitted).

To secure a conviction of first-degree premeditated murder, the prosecution must prove beyond a reasonable doubt that the killing was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). To show premeditation and deliberation, some time span between the initial homicidal intent and ultimate action is necessary. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). The interval between the initial thought and ultimate action should be long enough to afford a reasonable person to take a "second look" at his actions. *Id*. A pause of even a few seconds between the initial manifestation of homicidal intent and the ultimate act may be sufficient time for a defendant to deliberate. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979).

The prosecution produced credible evidence that defendant had time to take a "second look" at his actions before the killing took place. The prosecution introduced evidence that Sanders was killed with a large cement block found at the scene. The cement block was originally located across the roadway as part of a wall. The evidence also showed that Sanders was killed while she was lying down on the side of the roadway. The jury could properly infer that defendant crossed the roadway to obtain the cement block and returned with it to kill Sanders. The interval between crossing the road to obtain the block and returning with it to kill Sanders would be long enough to afford a reasonable person to take a "second look" at his actions. *Gonzalez, supra* at 641. In addition, the prosecution produced evidence that defendant hit Sanders twice with the same block as she was lying on the ground. The jury could properly infer that the defendant had sufficient time to take a "second look" at his actions as he used the same block to strike Sanders a second time.

Defendant next argues that the trial court erred by 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, this issue has been 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. *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999).

Defendant also claims, in the alternative, 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

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

must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

First, defendant contends that because defense counsel failed to object to the prosecutor's use of his silence, counsel performed deficiently and a new trial is required. Defense counsel was not ineffective for failing to object to these matters at trial because no error existed and it would have been futile to object. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Second, defendant contends that defense counsel was ineffective for waiving his right to be present at critical stages of the trial without his consent. It is true that defense counsel could not waive this right to be present for defendant. Because a defendant's right to be present is a fundamental right, the defendant's waiver must be on the record and knowing and voluntary. *Armstrong*, *supra* at 129-130. Therefore, defense counsel erred by purporting to waive defendant's right to be present for him. However, as observed above, defense counsel's error in this regard did not prejudice defendant. Defendant cannot demonstrate that, but for counsel's error in waiving his right to be present, the outcome of trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Third, defendant contends that defense counsel was ineffective for failing to request jury instructions on imperfect self-defense. "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 an 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 inconsistent with defendant's theory at trial. "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.

Defendant lastly argues that the trial court erred by ordering him to reimburse the county for the expenses of his court-appointed counsel without first considering his ability to pay. We disagree. The former rule was that before ordering an indigent defendant to reimburse the county for the cost of his or her court-appointed attorney, the trial court was required to "provide some indication of consideration, such as . . . a statement that it considered the defendant's ability to pay." *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). However, our Supreme Court has recently announced that "*Dunbar* was incorrect to the extent that it required a court to conduct an ability-to-pay analysis before imposing a fee for a court-appointed attorney," and that "*Dunbar*'s presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing." *People v Jackson*,

[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).

___ Mich ___; ___ NW2d ___ (2009), slip op at 1, 18. We therefore reject defendant's claim of error in this regard.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra