STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2009
v	No. 286956 Wayne Circuit Court
IVORY JAMAR CRAWFORD, Defendant-Appellant.	LC No. 07-011654-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced as a third habitual offender, MCL 769.11, to 50 to 100 years in prison. We affirm defendant's conviction, but vacate his sentence and remand for resentencing consistent with this opinion.

Defendant first argues that he was denied the effective assistance of counsel when his counsel failed to challenge the admission of his prior conviction of armed robbery and elicited testimony from defendant, himself, that he had been convicted of armed robbery. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "'To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.'" *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

On direct-examination, defendant acknowledged that he had been convicted of armed robbery in 2000. On cross-examination, the prosecutor elicited defendant's admission that armed robbery is a felony that involves taking property from someone by force.

A witness's credibility may be impeached with evidence of prior convictions, but only if the prior convictions satisfy the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). MRE 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
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> (2) the crime contained an element of theft, and
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> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

MRE 609(b) provides in pertinent part:

> For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify.

The crime of armed robbery contains an element of theft and is probative of a defendant's veracity. *People v Minor*, 170 Mich App 731, 736; 429 NW2d 229 (1988). However, "[c]rimes of theft are minimally probative and are therefore admissible only if the probative value outweighs the prejudicial effect as determined under the balancing test of MRE 609(a)(2)(B)." *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

Defendant testified at his 2008 trial that he was convicted of armed robbery in 2000, less than ten years earlier. MRE 609(c). Further, the probative value outweighed the prejudicial effect because the similarity between defendant's murder charge and the previous crime of armed robbery is minimal. With respect to the instant murder charge, although the prosecution alleged that defendant took the victim's wallet, the prosecution's theory was not that defendant killed the victim in order to take his wallet. We conclude that even if defense counsel had moved to preclude this evidence, the trial court would have been within its discretion to admit it.

Further, regardless of whether the trial court would have permitted the evidence defendant's prior conviction if defense counsel had moved to exclude it, defendant has failed to show a reasonable probability that the result of trial would have been different if his prior conviction had been excluded. Although credibility was important in this case, the exclusion of this piece of evidence would not have discredited the three witnesses who testified that they saw defendant kick and punch the victim repeatedly. We perceive no error in this regard.

Next, defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to request a jury instruction for voluntary manslaughter under a theory of killing under the heat of passion with adequate provocation. We disagree.

"[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Although provocation is not an element of voluntary manslaughter, provocation is the circumstance that negates the presence of malice, which is a requisite element of murder. *Id*. at 540.

There was no evidence that defendant acted with the heat of passion or that he was adequately provoked in the case at bar. Defendant's testimony suggested that he intervened when he saw the victim choking codefendant Durrell Moore. But there was no evidence that the victim was attacking defendant, himself, or that the victim had any other physical contact with defendant before defendant intervened. We accordingly conclude that this situation would not have caused a reasonable person to become provoked or to be unable to control his or her passions. See *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991). Further, "[t]he role of defense counsel is to choose the best defense for the defendant under the circumstances," *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994), and the decision to request or refrain from requesting an instruction is typically a matter of trial strategy, see *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). In light of the lack of evidence of provocation and heat of passion, a jury instruction on voluntary manslaughter would have been improper in this case. *Pouncey*, *supra* at 392 (observing that because there was insufficient evidence of adequate provocation, "the trial judge was correct in refusing the requested instruction on voluntary manslaughter"). It is well settled that counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

In addition, defendant argues that he was denied the effective assistance of counsel by his attorney's failure to request a jury instruction on voluntary manslaughter under a theory of imperfect defense of others. We disagree.

The defense of imperfect self-defense can mitigate second-degree murder to manslaughter when a defendant would have been entitled to claim self-defense had he or she not been the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Defendant suggests that his counsel was ineffective for failing to request an instruction on imperfect defense of others. However, it does not appear that any Michigan court has ever extended the imperfect self-defense rule to the imperfect defense of others. Indeed, we have located no authority to support or sustain defendant's argument on this issue. As noted earlier, counsel is not required to advocate a meritless position. *Mack*, *supra* at 130.

Defendant also argues that he is entitled to a new trial based on the newly discovered evidence that Dorothea Robinson has admitted to three other inmates that she lied about the extent of defendant's involvement in the killing. We disagree. Because this issue is not preserved, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A new trial may be warranted where the defendant satisfies a four part test, showing that: "(1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Although a discovery that trial testimony was perjured may provide a ground for a new trial under certain circumstances, *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994), newly discovered evidence does not require a new trial where it would merely be used for impeachment purposes or would relate only to a witness's credibility, *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

The newly discovered evidence presented by defendant in this case consists of three affidavits from three different individuals who have been or are incarcerated with Robinson. We conclude, however, that these affidavits do not establish that defendant is entitled to a new trial. Defendant contends that the affidavits show that Robinson has stated on repeated occasions that she exaggerated defendant's role in the victim's murder. We acknowledge that this evidence is arguably "newly discovered" because it was not available to defendant during trial. But according to the affidavits, the testimony of the three individuals would only serve to impeach Robinson's testimony. This type of newly discovered evidence is generally not a sufficient reason to grant a new trial. *Davis*, *supra* at 516.

Moreover, Robinson was subjected to extensive cross-examination at trial. And even if Robinson's testimony were to be impeached with this newly discovered evidence, it would not change the testimony of the two other witnesses, Sofhia Steen and Kela Keys, who each testified about defendant's beating of the victim, even as the victim was incapacitated and not fighting back. Defendant suggests that Steen's testimony can be explained away because she had access to Robinson's testimony at a preliminary examination. However, this topic was explored on cross-examination of Steen during trial. Defendant further suggests that Keys's testimony is not credible because she identified another man as having been involved in the crime. This issue was also explored during cross-examination, and Keys clarified that although this other man looked familiar, she had not positively identified him as being involved. The newly discovered evidence would merely cast doubt on Robinson's testimony; it would not alter the consistent and inculpatory testimony of Keys and Steen regarding defendant's involvement in the murder. We cannot conclude that the newly discovered evidence would make a different result probable on retrial. *Cress*, *supra* at 692.

Lastly, defendant argues that because he was only given notice that the prosecution would seek enhanced sentencing as a *second* habitual offender, his sentence as a *third* habitual offender was in error and he is entitled to resentencing. We agree.

The prosecuting attorney may seek to enhance the sentence of a defendant as a habitual offender by filing a written notice of his intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense. MCL 769.13(1); see also *People v Hornsby*, 251 Mich App 462, 470-471; 650 NW2d 700 (2002). The purpose of MCL 769.13 is to ensure that a defendant has notice at an early stage in the proceedings that he could be sentenced as a habitual offender. *People v Morales*, 240 Mich App 571, 582; 618 NW2d 10 (2000).

Defendant received notice in the felony information, as well as the amended felony information, that he could be sentenced as a second habitual offender. At the sentencing hearing, despite the fact that the prosecution never moved to amend the notice of enhancement, defendant was sentenced as a third habitual offender rather than as a second. This failure to follow the requirements of MCL 769.13, by not providing defendant with proper notice, constituted plain error. See *People v Barber*, 466 Mich 877; 661 NW2d 578 (2002).

Defendant's guidelines range as a third habitual offender was 270 to 675 months, while as a second habitual offender it would have been 270 to 562 months. Defendant was sentenced to a minimum sentence of 600 months (50 years) in prison. Thus, it is obvious that the trial court sentenced defendant as a third habitual offender, despite the lack of proper notice to defendant. It is equally clear that that this notice and sentencing error affected defendant's substantial rights, as it resulted in a longer actual sentence than defendant otherwise would have received. *People v Kimble*, 470 Mich 305, 312-313; 684 NW2d 669 (2004). Defendant is entitled to be resentenced as a second habitual offender.

We affirm defendant's conviction, but vacate his sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald