STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MILLER MOTT,

Defendant-Appellant.

UNPUBLISHED
August 19, 2010

No. 288407
Wayne Circuit Court
LC No. 07-015263-FC

Before: GLEICHER, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder,[1] MCL 750.317, three counts of felonious assault,[2] MCL 750.82, and being a felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of 60 to 90 years in prison for the murder conviction, 40 to 72 months in prison for the felonious assault convictions, and 60 to 120 months in prison for the felon in possession conviction. Defendant appeals as of right. We affirm.

Defendant's convictions stem from a robbery and shooting that took place at 9354 Holmur Street in Detroit late on September 20, 2007. Defendant shot and killed Latonya Jackson, an occasional resident of 9354 Holmur, took cash and illegal substances from Lashay Williams, another resident of 9354 Holmur, and threatened to kill Tometta Walls, a longtime resident of 9354 Holmur, and Theodore Norwood, a neighbor who was visiting on September 20,

[1] The prosecutor alternatively charged defendant with first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder (predicated on larceny), MCL 750.316(1)(b), in the death of Latonya Jackson. The trial court instructed the jury on second-degree murder as a lesser-included offense of first-degree murder. The jury found defendant guilty of two counts of second-degree murder, one of which the trial court vacated.

[2] The prosecutor charged defendant with one count of armed robbery, MCL 750.529, against Lashay Williams, and two counts of assault with intent to rob while armed, MCL 750.89, against Tometta Walls and Theodore Norwood. The trial court instructed the jury on the elements of felonious assault as a lesser-included offense of each charge, and the jury found defendant guilty of three lesser counts of felonious assault. The jury acquitted defendant of an additional felony-firearm charge.

2007. The testimony of Walls, Williams, and defendant himself agreed that he previously had gone to 9354 Holmur to acquire illegal substances, including on the day before the robbery and shooting. Walls, Williams, and Norwood identified defendant at trial as their assailant. Defendant's son, who acted as an accomplice to defendant's crimes, perished in an exchange of gunfire with Jackson.

I. ALLEGED INSTRUCTIONAL ERRORS

A. WAIVER

Defendant initially contends that the trial court failed to properly instruct the jury concerning prior inconsistent statements by several witnesses, voluntary manslaughter, and a claim of right as a defense to larceny. However, defense counsel did not request instructions on prior inconsistent statements or voluntary manslaughter. Furthermore, defense counsel at the close of the trial court's reading of final instructions twice affirmatively expressed satisfaction with the instructions as read. "Counsel's affirmative expression of satisfaction with the trial court's jury instruction waive[s] any error." *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal quotation omitted).

With respect to the claim of right instruction, the deliberating jury sent the trial court a note asking, "[I]s it still larceny to go back and request a refund for bad drugs?" The prosecutor urged that "the answer to that is yes. I don't have a case—." The trial court interjected, "Well, I can't do that. What I can do is tell them to use their common sense and rely on their collective memory." Defense counsel responded, "That answer I would prefer." The trial court reiterated that it would "not . . . answer the question except to say use common sense and collective memory," and the court subsequently so instructed the jury. Because the trial court gave the instruction favored by defense counsel, defendant has waived and thus extinguished an appellate claim of error concerning the propriety of the trial court's claim of right-related instruction. *Carter*, 462 Mich at 215; *Chapo*, 283 Mich App at 372-373.

B. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING JURY INSTRUCTIONS

Defendant next characterizes as ineffective assistance of counsel his attorney's neglect to seek proper instructions with respect to prior inconsistent statements, voluntary manslaughter, and claim of right as a defense to larceny. Because defendant did not raise these assertions in a motion for new trial or an evidentiary hearing, we limit our review of the ineffective assistance claim to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first 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). This Court reviews for clear error a trial court's findings of fact, and considers de novo questions of constitutional law. *Id.*

"[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657

(1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

1. PRIOR INCONSISTENT STATEMENT INSTRUCTION

Defendant insists that given the introduction at trial of prior inconsistent statements to the police by Walls, Williams and Holmur resident Bernard Lattin, defense counsel should have ensured that the jury received instruction "regarding the proper use and effect of . . . prior inconsistent statements." Defendant theorizes that absent some instruction about the appropriate consideration of prior inconsistent statements, the jury might have believed that it could not consider the prior inconsistent statements. Case law cited by defendant points to CJI2d 4.5 as the instruction he maintains counsel should have sought.[3]

Even assuming that defense counsel unreasonably erred in neglecting to make certain that the trial court gave an instruction about prior inconsistent statements, this omission did not affect the outcome of defendant's trial. The record reveals that defense counsel pursued the defense goal of impugning the credibility of several prosecution witnesses, including Lattin, Watts and Williams, by vigorously cross-examining them. Defense counsel elicited multiple discrepancies

[3] Pursuant to CJI2d 4.5,

> *Prior Inconsistent Statement Used to Impeach Witness*
>
> (1) If you believe that a witness previously made a statement inconsistent with [his/her] testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.
>
> *Prior Inconsistent Statement Used Both to Impeach and as Substantive Evidence*
>
> (2) Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.

between Lattin's, Watts's, and Williams's trial testimony and prior statements they made to the police and under oath at defendant's preliminary examination.[4] Defense counsel emphasized the discrepancies among the prior statements and trial testimony of Lattin, Watts, and Williams, specifically declared that "they all lied," stressed that the jury should view the testimony of Watts and Williams with caution in light of their concessions that they abused illegal drugs, and suggested that the jury consequently should reject the entirety of their testimony incriminating defendant. Consequently, defendant's argument on appeal that the jury might not have considered the trial testimony together with the prior inconsistent statements for credibility purposes rings hollow. Furthermore, the trial court instructed the jury with regard to (1) its sole prerogative to "decide the facts of the case," which encompassed the responsibility to determine "whether you believe what each of the witnesses said," (2) the detailed considerations set forth in CJI2d 3.6 applicable when gauging witness credibility, and (3) the caution with which it should approach its weighing of testimony given by addict witnesses, consistent with CJI2d 5.7.[5] Given that the jury plainly had awareness of the numerous inconsistencies in the accounts of the prosecutor's witnesses and its duty to discern witness credibility under all relevant circumstances of the case, we conclude that the instructions given adequately protected defendant's rights, *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001), and that no reasonable probability exists that any deficiency related to defense counsel's failure to demand a prior inconsistent statement instruction affected the outcome of defendant's trial. *Solmonson*, 261 Mich App at 663.

2. VOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant next avers that the evidence warranted an instruction on voluntary manslaughter as a lesser-included offense of the murder charge, and that his counsel's neglect to request a voluntary manslaughter instruction amounted to ineffective assistance of counsel.

> To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions. The degree of provocation required to mitigate a killing from murder to manslaughter is that which causes the defendant

[4] Some of the inconsistencies defense counsel placed on the record included (1) next door neighbor Lattin's acknowledgement that he had lied during his direct examination when he referenced having seen defendant holding a weapon on the evening of September 20, 2007; (2) Watts's concessions that she did not recall previously making statements about having heard two or three shots that evening or having heard gunshots from two different firearms, and that she generally did not remember the details of her prior statements to the police; and (3) Williams's admissions that (a) she had lied to the police about her identity and drug dealing and had lied at the preliminary examination about having sold defendant illegal drugs, (b) one of her prior statements to the police did not reflect that defendant had pointed a gun at her, (c) she did not recall having earlier mentioned that Jackson had a gun in her bedroom, which Jackson had fired while upstairs in the bedroom.

[5] Both Walls and Williams admitted that they had substance abuse problems and used drugs on September 20, 2007.

> to act out of passion rather than reason. In order for the provocation to be adequate it must be that which would cause a reasonable person to lose control. [*People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005) (internal quotation omitted).]

"[M]anslaughter is a necessarily included lesser offense of murder because the elements of manslaughter are included in the offense of murder." *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003). "[T]he element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion. Thus . . . the elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice." *Id*. at 540. "Consequently, when a defendant is charged with murder, an instruction for voluntary . . . manslaughter must be given if supported by a rational view of the evidence." *Id*. at 541; see also *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007) (observing that "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it") (internal quotation omitted).

At trial, defendant presented the theory that he had shot Jackson in self-defense. In opening statement and closing argument, defense counsel argued that Jackson had engaged defendant in gunfire after she fell through the ceiling, and that defendant's return of fire constituted self-defense. Defendant similarly testified at trial that as he ran downstairs and happened on his son sitting against a wall, Jackson sat up and shot defendant in the right arm, after which he shot back three times because "I was scared I was going [to] be like my son. He was already dead." Even assuming that the evidence supported presentation of a voluntary manslaughter defense premised on defendant's shooting of Jackson after she had shot defendant's son, we conclude that in a reasonable election of trial strategy defense counsel opted to instead pursue a self-defense theory, which would have entirely exonerated defendant of culpability for his shooting of Jackson. *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983) (emphasizing that "defense counsel's decision not to request lesser included offense instructions . . . [is] a matter of trial strategy").

3. CLAIM OF RIGHT INSTRUCTION

Defendant further asserts that defense counsel should have ensured that the jury heard an instruction on claim of right constituting a defense to larceny. Larceny was at issue at defendant's trial because the prosecutor charged defendant with felony murder premised on an underlying larceny, MCL 750.316(1)(b), and a count of armed robbery against Williams, of which charge larceny comprised an element. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).

The basic elements of larceny are:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner . . . .

> [T]he specific intent necessary to commit larceny is the intent to steal another person's property. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999) (internal quotation omitted).]

"[A] claim of right defense arises when there is a dispute regarding a defendant's felonious intent at the time of the taking." *Id*. at 118-119.

> According to this defense, if a defendant had a good-faith belief that the defendant had a legal right to take the property at issue, then the defendant cannot be convicted [of larceny] because the defendant did not intend to deprive another person of property. The defense applies even if the belief is mistaken or unreasonable. [*Id*. at 119.]

Here, defendant's claim of right stems from his purported intent on arriving at 9354 Holmur on September 20, 2007 "to seek repayment of money for a bad drug debt" that he had incurred the previous day. Defendant testified that on September 19, 2007, he had purchased from Williams some quantity of illegal drugs for resale that did not in fact constitute the drugs he intended to purchase. Defendant's conceded knowledge that Williams's alleged debt to him arose from illegal activity "negates the existence of good faith" necessary to sustain a claim of right defense to larceny. *People v Karasek*, 63 Mich App 706, 713; 234 NW2d 761 (1975). Because defendant was not entitled to a claim of right defense, "[c]ounsel [wa]s not ineffective for failing to advocate a meritless position." *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (internal quotation omitted). Moreover, the jury's decision not to convict defendant of any crimes containing an element of larceny rendered harmless any instructional error.

II. SUPPLEMENTAL BRIEF ON APPEAL

In a standard 4 brief on appeal,[6] defendant complains that his second-degree murder conviction went against the great weight of the evidence, in light of the facts that the jury acquitted him of armed robbery and felony-firearm and "undisputed" evidence of record proved that he acted in self-defense. "We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 217. "A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 232.

"The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009), lv gtd 485 Mich 1050 (2010).

[6] Administrative Order 2004-6, Standard 4.

> Malice is defined as 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. Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. [*People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (internal quotation omitted).]

Regarding self-defense,

> [a]s a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he 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. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]

But "[o]ne who is involved in a physical altercation in which he is a willing participant . . . is *required* to take advantage of any reasonable and safe avenue of retreat before using deadly force against his adversary, should the altercation escalate into a deadly encounter." *Id*. at 120 (emphasis in original). And "an act committed in self-defense but with excessive force or in which defendant was the initial aggressor does not meet the elements of lawful self-defense." *People v Heflin*, 434 Mich 482, 509 (opinion by Riley, C.J.); 456 NW2d 10 (1990). However, "under § 2 of the [Self-Defense Act, MCL 780.971 *et seq*.], there is no duty to retreat if the person has not committed or is not committing a crime and has a legal right to be where the person is at the time he or she uses deadly force." *People v Conyer*, 281 Mich App 526, 530 n 2; 762 NW2d 198 (2008). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (internal quotation omitted).

Norwood, Watts, and Williams all similarly testified in this case that defendant shot Jackson multiple times. Williams recounted that defendant came to the house asking to buy illegal drugs, and shortly thereafter pointed a gun at her and threatened that if she did not cooperate "everybody here was gonna die." Williams gave defendant the drugs and money she had in her purse, and he proceeded to transport Walls, Jackson, and Norwood at gunpoint from the front porch into the living room of 9354 Holmur, assisted by defendant's son, who brandished a firearm resembling a small machine gun. When defendant chased Jackson up the stairs, Williams heard him tell her to "open the door or everybody was gonna die." Walls and Norwood corroborated Williams's summary of defendant's assault on 9354 Holmur. Norwood, Walls, and Williams all further agreed that they first heard a gunshot fired upstairs, and then they

saw Jackson fall through a hole in the ceiling, firing her gun as she came down. The three witnesses also confirmed that after defendant came downstairs, he stood over Jackson and fired his gun into her several times as she lay on the floor.[7]

Defendant offered a contrary version of events, testifying that he went to 9354 Holmur to get a refund for a bad drug transaction, and that he carried a handgun "for protection," not intending to rob or shoot anyone. Defendant averred that he told his son to remain outside, and that as he spoke to Williams in the living room he heard a commotion on the porch, which prompted him to draw his weapon and investigate. When Jackson ran inside and up the stairs, rather than retreat, defendant followed her "to see what she was doing." After hearing a shot, followed by several more shots coming from the lower level, defendant ran back downstairs and found his son sitting motionless against a wall. Defendant also noticed that Jackson was lying motionless near his son, but related that Jackson sat up and shot at him as he attended to his son, at which point he returned fire and killed Jackson.

Defendant's account differed from the accounts of Norwood, Watts, and Williams, but "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003) (internal quotation omitted). "Unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. (internal quotation omitted). We conclude that from the trial testimony of Norwood, Walls, and Williams the jury could reasonably have found beyond a reasonable doubt that defendant committed second-degree murder in shooting Williams, and did not act in self-defense, because defendant (1) arrived at 9354 Holmur armed with a handgun and assaulted the occupants of the residence, (2) instigated an altercation, (3) failed to retreat despite having an opportunity to do so,[8] and (4) when he fired his weapon at Jackson, he acted, at the very least, with wanton and wilful disregard of the likelihood that the natural tendency of his behavior would cause death or great bodily harm. In summary, the trial court did not abuse its discretion in denying defendant's motion for a new trial because defendant did not establish that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

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[7] Two witnesses did give prior inconsistent statements about the shooting. Williams initially told the police that Jackson had a brief gunfire exchange with both defendant's son and defendant after she fell through the ceiling, successfully wounding defendant in his arm. In Walls's statement to the police, she did not express that she actually saw defendant shoot Jackson, but mentioned instead that she had her head down during the shooting; however, Walls insisted at trial, "I seen him standing up over her shooting her." Nevertheless, "questions of witness credibility are generally insufficient grounds for granting a new trial. Absent exceptional circumstances, issues of witness credibility are for the trier of fact.'" *Unger*, 278 Mich App at 232.

[8] The Self-Defense Act, MCL 780.972(1), offers defendant no relief in light of the jury's finding that he committed three counts of felonious assault, which verdict finds ample support in the consistent descriptions of events by Norwood, Walls, and Williams. *Conyer*, 281 Mich App at 530 n 2; *Chambers*, 277 Mich App at 8.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder