STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee-Cross Appellant,

v

MENAYETTA MICHELL YEAGER,

Defendant-Appellant-Cross Appellee.

UNPUBLISHED
December 21, 2021

No. 346074
Wayne Circuit Court
LC No. 17-008290-01-FC

Before: O'BRIEN, P.J., and BECKERING and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Before plenary review, this Court remanded this case to the trial court for that court to conduct a *Ginther*[1] hearing "limited to the issue of whether defendant's trial counsel rendered ineffective assistance of counsel by failing to request an instruction on voluntary manslaughter as a lesser included offense to murder."[2] Following the *Ginther* hearing, the trial court granted defendant a new trial. The prosecution filed a cross-appeal to contest this ruling.

Addressing the issues raised in defendant's original appeal, we find no error. In the prosecution's cross-appeal, we agree with the prosecution that the trial court erred by concluding that defendant received ineffective assistance of counsel at trial, and therefore reverse the trial court's ruling granting defendant a new trial.

I. FACTUAL BACKGROUND

This action arises from the murder of defendant's boyfriend. According to defendant, on the day of the murder, she and the victim were returning to defendant's house from a local

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1993).

[2] *People v Yeager*, unpublished order of the Court of Appeals, issued November 9, 2020 (Docket No. 346074).

restaurant in a minivan that belonged to defendant's mother. While defendant was driving home, she told the victim she did not want to be in a relationship with him anymore. The victim responded by striking defendant in the face while she was still driving and hitting her repeatedly until she stopped the van in the middle of the street. The victim then got out of the van, pulled defendant out by her hair, and continued to hit her. Defendant managed to get away from the victim and ran down the street, but the victim got in the van and attempted to hit defendant with the vehicle. Defendant called the police, but the victim drove away before police arrived.

Labarren Borom testified that he saw the victim attempt to hit defendant with a vehicle outside of Borom's house. Borom recognized defendant as the daughter of a coworker, who lived in the area. Borom saw the victim drive the van onto Borom's front lawn and a neighbor's front lawn, and believed the victim was trying to hit defendant. Defendant appeared disheveled and looked as if someone recently punched or hit her. After Borom saw the victim drive the van down the street, Borom got in his truck and drove toward defendant to make sure she was safe. Defendant was crying and yelling on the side of the road, and when Borom spoke to her, she asked him to drive her to get the van. Borom agreed, and defendant got in his truck.

Defendant spoke to the victim on her cellphone, and the victim told her he would leave the van at the intersection of Warren Avenue and Van Dyke Street. However, the victim had not brought the minivan to that location by the time Borom and defendant arrived. Defendant continued speaking to the victim on her cellphone, demanding he give her the van. Defendant then told Borom that the victim would meet them at the intersection of Mack Avenue and Van Dyke Street, where defendant could pick up the minivan. Defendant and Borom drove to a Sunoco gas station near Mack Avenue and Van Dyke Street.

According to defendant, while she as on the phone with the victim, he began yelling that he saw her with Borom and threatened to kill them. Defendant testified that when she and Borom pulled into the Sunoco gas station, she attempted to get out of Borom's truck and run away, but Borom gave her a gun as she was getting out of the truck. According to defendant, she took the gun and fired two or three times at the victim because she feared that the victim was going to try to kill her.

Borom's account of the events somewhat differed from defendant's. Borom testified that the victim pulled into the gas station after he and defendant did, and then began verbally taunting defendant. This led to defendant and the victim arguing with each other. According to Borom, during the argument, defendant leaped out of Borom's truck, pulled out a handgun, and fired multiple times at the victim. The victim sped away, and defendant chased him on foot for a moment while still shooting at the van. Defendant then returned to Borom's truck, and Borom told her he would drive her back to his house since it seemed that she would not be getting her van from the victim.

Officers were dispatched to the scene and found the victim in the van. He had apparently lost control of the van and crashed into a brick wall in a parking lot near the gas station. When officers found the victim, he was nonresponsive and appeared to have a bullet wound in his chest. He was transported to a hospital, where he was pronounced dead on arrival. Back at the gas station, officers recovered 17 shell casings. An autopsy of the victim later determined that his death was caused by a bullet that entered through the back of his shoulder and pierced his lung. The victim's

death was ruled a homicide. Defendant was identified as the shooter, and when she heard that the police were looking for her, she turned herself in.

As previously stated, defendant was convicted by a jury of first-degree premeditated murder and felony-firearm. Defendant appealed, and this Court remanded for the trial court to conduct a *Ginther* hearing on the issue of whether defendant's trial counsel rendered ineffective assistance of counsel by failing to request an instruction on voluntary manslaughter as a lesser included offense to murder. Following the *Ginther* hearing, the trial court concluded that the testimony given by defendant at the *Ginther* hearing supported that a voluntary-manslaughter instruction would have been appropriate, that defendant's trial counsel performed deficiently by failing to communicate to defendant that voluntary manslaughter was a possible mitigation defense and to otherwise request an instruction for voluntary manslaughter, and that this deficient performance prejudiced defendant.

Defendant appealed issues related to her trial, and the prosecution cross-appealed the trial court's ruling following the *Ginther* hearing.

II. DEFENDANT'S APPEAL

A. EVIDENCE OF OTHER ACTS

Defendant argues the trial court erred by declining to allow her to introduce evidence of the victim's past acts of domestic violence under MCL 768.27b and MRE 404(b). We disagree.

"The decision whether to admit evidence falls within a trial court's discretion and will be reversed only when there is an abuse of that discretion." *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010). Underlying questions of law are reviewed de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

Initially, we note that the trial court allowed defendant to present evidence showing that the victim was physically and verbally abusive to defendant and had a character for aggression, see MRE 404(a)(2),[3] and defendant's contention on appeal is that the trial court should have allowed her to present evidence of specific instances where the victim abused her. Yet defendant

[3] MRE 404(a)(2) states:

> (a) ***Character evidence generally.*** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> * * *
>
> (2) ***Character of alleged victim of homicide.*** When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused[.]

does not identify any specific acts of domestic violence committed by the victim that the trial court should have allowed into evidence. She instead asserts without specificity that the victim's "prior acts of domestic violence" should have been admitted. By failing to specify what evidence was erroneously excluded, defendant has failed to adequately present this issue for our review. Despite this failure, we briefly address defendant's arguments and conclude that they have no merit.

Defendant first argues that the victim's acts of domestic violence towards defendant should have been admitted under MCL 768.27b(1), which states:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE] 403.

Fatal to defendant's argument is the simple fact that, by its terms, MCL 768.27b(1) is only applicable to "evidence of the defendant's commission of other acts of domestic violence"; the statute says nothing about the admission of a victim's other acts of domestic violence. Because MCL 768.27b(1) does not allow for the admission of a victim's commission of other acts of domestic violence, the trial court did not err by not admitting evidence of the victim's past acts of domestic violence under this statute.

Defendant alternatively argues that the trial court erred by not admitting evidence of the victim's past acts of domestic violence under the res gestae exception to MRE 404(b). MRE 404(b) allows for the admission of other-acts evidence for non-propensity purposes such as to prove motive, opportunity, or intent. Our Supreme Court has plainly stated, however, that "there is no 'res gestae exception' to MRE 404(b)," *People v Jackson*, 498 Mich 246, 274; 869 NW2d 253 (2015), so defendant's contention that the victims past acts of domestic violence should have been admitted "under the *res gestae* exception to MRE 404(b)" is without merit.

In the same argument, defendant more generally asserts that she should have been permitted to introduce evidence of the victim's past acts of domestic violence to provide context for why she feared for her life when she shot the victim "five minutes" after he attacked her. Yet the trial court allowed defendant to present evidence showing that the victim was physically and verbally abusive to defendant and had a character for aggression. Defendant does not explain why, in light of this evidence, it was necessary for the trial court to admit evidence of specific instances where the victim abused defendant.

Lastly, defendant contends that the trial court's exclusion of evidence of the victim's past acts of domestic violence deprived defendant of evidence necessary to prove "battered woman syndrome." "The 'battered woman syndrome' generally refers to common characteristics appearing in women who are physically and psychologically abused by their mates." *People v Wilson*, 194 Mich App 599, 603; 487 NW2d 822 (1992) (quotation marks and citation omitted).

Defendant claims that battered woman syndrome is an affirmative defense, but that is incorrect.[4] Evidence of battered woman syndrome is typically offered to support a claim of self-defense. *People v Christel*, 449 Mich 578, 589; 537 NW2d 194 (1995). As our Supreme Court explained:

> [E]xpert scientific evidence concerning "battered-woman's syndrome" does not aid a jury in determining whether a defendant had or had not behaved in a given manner on a particular occasion; rather, the evidence enables the jury to overcome common myths or misconceptions that a woman who had been the victim of battering would have surely left the batterer. Thus, the evidence helps the jury to understand the battered woman's state of mind. [*Id*. (quotation marks and citation omitted).]

Put simply, evidence that a defendant suffered from battered woman syndrome could help a jury evaluate a self-defense claim—such as aiding the jury in assessing whether the defendant reasonably believed her life was in danger—but battered woman syndrome is not, itself, a defense.

With this understanding of battered woman syndrome in mind, it is clear that defendant's argument is without merit. Battered woman syndrome is established through expert testimony, not through the admission of specific instances of domestic violence. Thus, the trial court's decision to exclude evidence of the victim's past acts of domestic violence did not deprive defendant of the opportunity to present evidence of battered woman syndrome to aid her claim of self-defense.[5]

B. JURY INSTRUCTIONS

Defendant argues the trial court erred by failing to instruct the jury regarding the crimes of voluntary manslaughter, involuntary manslaughter, and reckless discharge of a firearm. We disagree.

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[4] Defendant attributes her assertion that battered woman syndrome is an affirmative defense to *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002)—a case dealing with a defense of others theory. *Kurr* makes no mention of battered woman syndrome.

[5] Defendant also argues that defense counsel at trial provided ineffective assistance by not calling an expert to testify about battered woman syndrome. It is well established that the defendant has the burden of establishing the factual predicate for her claim of ineffective assistance of counsel. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). Defendant never presented any affidavits or other proof in either the trial court or on appeal suggesting what an expert witness on battered woman syndrome would have testified to at trial. Our Supreme Court has recognized that not all women in abusive relationships necessarily suffer from battered woman syndrome, see *Christel*, 449 Mich at 588, and defendant has not presented proof that she suffered from the syndrome other than the fact that the victim was abusive. Thus, defendant failed to establish the factual predicate of her ineffective assistance claim, and that claim does not warrant appellate relief.

Defendant did not request jury instructions for voluntary and involuntary manslaughter or reckless discharge of a firearm. In fact, defendant expressed satisfaction with the jury instructions as given after they were read to the jury. It is well settled that "an affirmative statement that there are no objections to the jury instructions constitutes express approval of the instructions, thereby waiving review of any error on appeal.' *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011). Accordingly, defendant has waived any claim of error, and this Court need not further analyze this issue on appeal.[6]

C. STANDARD 4

In a Standard 4 brief, defendant raises several claims of ineffective assistance.

To prevail on an ineffective assistance claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008).

Defendant first argues that her trial counsel was ineffective because he did not communicate with her enough and failed to adequately prepare her to testify. Assuming that this allegation is true[7] and that her trial counsel's performance was objectively unreasonable, defendant does not explain how the outcome of her trial would have been different but for this performance. For instance, defendant does not explain how her trial testimony would have differed had her counsel better prepared her to testify. Because defendant has not alleged that anything about her trial would have been different but for her trial counsel's performance, she has necessarily failed to establish a claim of ineffective assistance warranting appellate relief. See *Trakhtenberg*, 493 Mich at 51.

Next, defendant argues that her trial counsel failed to adequately investigate her case and, consequently, failed to secure witnesses and evidence that would have been favorable to her defense. Defendant contends that had her trial counsel investigated her medical records and obtained reports from various police departments, he would have discovered evidence showing that the victim had abused defendant in the past. Defendant also contends that had her trial counsel investigated her case more thoroughly, he could have located an unidentified witness that would have testified about the victim's past abuse of defendant. Initially, we note that (1) evidence that the victim was aggressive to the victim and physically abused her was already before the jury, and (2) defendant has failed to explain how specific instances of the victim's past abuse were

[6] In a supplemental brief, defendant argued that her trial counsel was ineffective for failing to request instructions for voluntary manslaughter. This was the issue that this Court remanded to the trial court for a *Ginther* hearing, and is discussed in Section III.

[7] At the *Ginther* hearing unrelated to this issue, the trial court found that defendant's trial counsel communication with defendant was "very poor."

admissible, as explained in Section II.A. Regardless, defendant has not presented any of the medical records or police reports that she claims would have established that the victim abused her, nor has she identified the witness that could have testified about the victim's abuse of defendant or what that witness would have said. Thus, defendant has failed to establish the factual predicate of her ineffective assistance claim. *Dendel*, 481 Mich at 125.

Defendant lastly argues that she was prejudiced by the cumulative effect of her trial counsel's errors. However, having identified no errors, defendant's cumulative-error claim fails. See *People v Dobek*, 274 Mich App 58, 107; 732 NW2d 546 (2007).

III. PROSECUTION'S CROSS-APPEAL

In its cross-appeal, the prosecution argues that the trial court erred by ruling that defendant's trial counsel rendered ineffective assistance of counsel by failing to request a voluntary manslaughter instruction. We agree.

Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error, while legal conclusions are reviewed de novo. *Id*. As previously stated, to prevail on an ineffective assistance claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. Counsel is presumed effective, and defendant carries a heavy burden to overcome this presumption. *Head*, 323 Mich App at 539.

"[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Voluntary manslaughter is a mitigation defense and "requires a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009).

In finding that defendant's trial counsel was ineffective for not requesting a voluntary-manslaughter instruction, the trial court first walked through the evidence presented at the *Ginther* hearing as it related to the incident that led to the charges against defendant, made factual findings related to that evidence, and concluded that a voluntary-manslaughter instruction was supported by those factual findings. The court then addressed defendant's trial counsel's performance and determined that her counsel failed to request a voluntary-manslaughter instruction "based on his serious misunderstanding of the law," which led to defendant's trial counsel failing to inform defendant that voluntary manslaughter was a possible mitigation defense. This, the court determined, amounted to "deficient representation." Turning to the prejudice prong, the trial court ruled that this deficient performance prejudiced defendant because "the record establishes that any reasonable juror could find, based upon the evidence, that, uhm, [defendant] was guilty of voluntary manslaughter, and not first degree murder."

We agree with the trial court that defendant has established that her trial counsel's performance fell below an objective standard of reasonableness. On appeal, the prosecution argues

that it was trial strategy for defendant's trial counsel to not request a voluntary manslaughter instruction. It is true that defendant's trial counsel testified that he did not request a voluntary-manslaughter instruction because that "would have been inconsistent" and "totally against . . . what we were saying. . . . That was not in our defense."[8] It is also true that "[f]ailing to request a particular jury instruction can be a matter of trial strategy," *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013), and "counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). However, any strategy used by counsel must, in fact, be sound, and "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Douglas*, 496 Mich 557, 585; 852 NW2d 587 (2014) (quotation marks and citation omitted).

Defendant's trial counsel's strategy here was not, in fact, sound. At the *Ginther* hearing, defendant's trial counsel repeatedly explained that he did not believe that a voluntary-manslaughter instruction was appropriate in this case because he did not believe that defendant intended to kill or seriously harm the victim. Defendant's trial counsel's understanding of the law in this sense was arguably correct; for a defendant to be guilty of voluntary manslaughter, the killing must be intentional. See *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991) (explaining that murder and voluntary manslaughter "are both homicides and share the element of being intentional killings," but "the element of provocation which characterizes the offense of manslaughter separates it from murder"). Yet defendant's trial strategy was that she acted in self-defense, and our Supreme Court has repeatedly explained that " '[a] finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions.' " *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010), quoting *People v Heflin*, 434 Mich 482, 503; 456 NW2d 10 (1990). That is to say, the jury needed to find that defendant acted intentionally for the strategy used by defendant's trial counsel to be successful. Defendant's trial counsel's decision to not request a voluntary-manslaughter instruction because voluntary manslaughter requires that the killing be intentional, while pursuing a defense that "necessarily requires a finding that the defendant acted intentionally," *id.*, was not sound trial strategy, and was otherwise objectively unreasonable.

We agree with the prosecution, however, that the trial court erred when it concluded that defendant's trial counsel's deficient performance prejudiced defendant. As stated previously, the trial court reasoned that trial counsel's deficient performance prejudiced defendant because "the record establishes that any reasonable juror could find, based upon the evidence, that, uhm, [defendant] was guilty of voluntary manslaughter, and not first degree murder." Yet the mere fact that a juror *could* find defendant guilty of voluntary manslaughter, not first-degree murder, is not determinative. The question is whether "but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at

[8] The prosecution contends on appeal that defendant's trial counsel was "seeking an all or nothing verdict," but that contention is not borne out by the record. Defendant's trial counsel never testified that he did not request a voluntary-manslaughter instruction because defendant's strategy was "all or nothing." Rather, as will be explained, he repeatedly testified that he did not seek a voluntary-manslaughter instruction because he did not believe that the killing in this case was intentional.

51. The outcome here was that the jury found defendant guilty of first-degree murder, and in so doing rejected the lesser charge of second-degree murder. As pointed out by the prosecution, this is identical to the situation in *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997), wherein this Court explained why counsel's failure to request a voluntary-manslaughter instruction in this situation did not amount to ineffective assistance of counsel:

> Lastly, defendant argues that he was denied effective assistance of counsel because his trial attorney failed to submit jury instructions regarding the lesser included offenses of voluntary and involuntary manslaughter. We find no merit in this argument. In this case, defendant was charged with first-degree murder. The jury was instructed on first-degree murder and second-degree murder, and found defendant guilty of first-degree murder. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Thus, even if defendant's trial counsel had requested a manslaughter instruction and the trial court had failed to give such an instruction, such error would have been harmless. For the same reason, defendant cannot show that his counsel's failure to request a manslaughter instruction caused him prejudice. Accordingly, defendant cannot sustain his claim of ineffective assistance of counsel. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

As a published decision, we are bound by the reasoning in *Raper* under the rule of stare decisis. MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.").[9] We therefore reverse the trial court insofar as it held that defendant established a claim of ineffective assistance of counsel and awarded her a new trial.

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[9] Defendant urges us to convene a conflict panel with *Raper* under MCR 7.215(J), but we decline to do so because we are not convinced that *Raper* was wrongly decided. Defendant was convicted of first-degree murder. "The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and *deliberation*," *People v Bass*, 317 Mich App 241, 265-266; 893 NW2d 140 (2016) (quotation marks and citation omitted; emphasis added); see also MCL 750.316(1)(a) (defining first-degree murder as "any willful, deliberate, and premediated killing"), whereas "[a] defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by an adequate provocation and *not from the deliberation* and reflection that marks the crime of murder," *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974) (emphasis added). See also *People v Younger*, 380 Mich 678, 681-682; 158 NW2d 493 (1968) ("If there be actions manifesting deliberation, it cannot be said, legally, that the homicide was the product of provocation which unseated reason and allowed passion free reign."). That is, a finding of deliberation would seem to necessarily preclude a finding that the defendant killed in of the heat of passion, i.e., committed voluntary manslaughter. Here, when instructing the jury on the elements of first-degree murder, the trial court stated that in order to convict defendant of first-degree murder, it had to find "that the killing was deliberate, which means that the defendant considered the pros and cons of the killing, and thought about, and chose her actions before she did it." The jury's conviction of first-degree murder demonstrates that it found that

IV. CONCLUSION

In defendant's appeal, we affirm. In the prosecution's cross-appeal, we reverse the trial court's order awarding defendant a new trial.

/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron

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defendant "considered the pros and cons of the killing, and thought about, and chose her actions before she did it," which would seem to necessarily preclude a finding that defendant killed in the heat of passion in this case.