STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July19, 2011
v	No. 296060 Wayne Circuit Court
GEORGE MICHAEL COBREA, Defendant-Appellant.	LC No. 09-013562-FC

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced to 20 to 30 years' imprisonment. We affirm.

Defendant was charged with the murder of his girlfriend, Patricia Robertson. Roberton's body was found in the front passenger seat of her car in the driveway of the home defendant shared with his mother and step-father. Defendant had spent the previous night at Robertson's home. When his mother got home in the late morning, she saw the Robertson's car in the driveway and asked defendant where Robertson was. Defendant was initially unresponsive and then made a slashing motion with his right hand across his chest. Defendant's mother asked him if Robertson was dead and he nodded yes. He told his mother that Robertson was in the car. His mother made statements indicating her disbelief that he could have killed Robertson, but defendant nodded affirmatively and shrugged his shoulders when she asked him why. There was also substantial circumstantial and forensic evidence linking defendant to the killing including a bloody knife and cap.

After the charges were filed, the defense requested that the court appoint a psychologist at court expense to conduct an examination of defendant to evaluate him as to criminal responsibility. The defense called no witnesses at trial. Defendant was acquitted of first-degree premeditated murder and convicted of second-degree murder.

Defendant argues that the trial court erred when it denied his untimely request for a jury instruction on the lesser included offense of involuntary manslaughter and that defense counsel was ineffective for failing to timely request it. Unpreserved jury instruction errors are reviewed for plain error affecting a defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130

(1999). In proving plain error, defendant must establish that an error occurred, the error was plain, i.e., clear and obvious, and the error affected defendant's substantial rights by affecting the outcome of the trial court proceedings. *Id*.

A jury 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." *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005). Our Supreme Court has held that manslaughter is a necessarily included lesser offense of murder and an instruction on manslaughter "must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Involuntary manslaughter:

> "is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.'" If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter. [*People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004), quoting *People v Datema*, 448 Mich 585, 594-595; 533 NW2d 272 (1995).]

A rational view of the evidence does not support a finding that defendant unintentionally killed the victim without malice. The victim was stabbed in the neck four times and she had defensive wounds on both hands. Consequently, the record does not support the conclusion that defendant lacked malice and committed the crime with only gross negligence or intent to injure. Rather, the victim's multiple stab wounds and defensive wounds highlight an intent to kill the victim. Thus, the trial court properly denied defendant's request for a jury instruction on the lesser included offense of involuntary manslaughter and defense counsel was not ineffective for requesting the instruction in an untimely manner because, even if counsel had made a timely request, the request would have been futile. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant also asserts that he was denied the effective assistance of counsel on other grounds. The determination of whether a defendant was deprived of effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* To establish a claim of ineffective assistance of counsel, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, the result of the proceeding would have been different. *Mack*, 265 Mich App at 129. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *Id.* Defendant must also overcome a strong presumption that defense counsel's actions constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Defendant first argues that defense counsel promised the jury during his opening statement that it would be presented with the personal journals of the victim, Patricia Robertson. The failure to present evidence only rises to ineffective assistance if defendant is deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record evidences that defense counsel was not promising the victim's personal writings to the jury during his opening statement, but, instead, appears to have improperly referred to evidence that the trial court had previously ruled inadmissible. Furthermore, defendant has not shown that he was deprived of a substantial defense as a result of counsel's failure to produce and comment on evidence that the court ruled inadmissible.

Defendant next argues that counsel was ineffective for conceding defendant's presence within the victim's vehicle during both his opening statement and closing argument. However, a lawyer does not render ineffective assistance by conceding certain points at trial. *People v Emerson* (*After Remand*), 203 Mich App 345, 349; 512 NW2d 3 (1994). Counsel could have had many reasons for conceding defendant's presence within the victim's vehicle, including the need to argue that, regardless of defendant's presence there, the prosecution had not proven the events that had transpired within the vehicle beyond a reasonable doubt. Thus, defendant has not overcome the presumption that counsel's actions constituted sound trial strategy, or shown he was prejudiced by any deficiency in counsel's performance.

Defendant also argues that defense counsel was ineffective because counsel did not allow defendant to testify. A defendant's right to testify in his own defense is personal and fundamental. *People v Solomon*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996). "If the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). But, if a criminal defendant "acquiesces in his attorney's decision that he not testify, 'the right will be deemed waived.'" *Id*., quoting *State v Albright*, 96 Wis 2d 122, 135; 291 NW2d 487 (1980). In his motion for new trial, defendant submitted an affidavit asserting that he intended at all times to testify at trial, that he would have testified that he acted in self-defense, and that the only reason he did not testify was because defense counsel did not call him as a witness. However, during trial, the trial court inquired on the record whether defendant wished to testify. Defense counsel advised the trial court in defendant's presence that he had "talk[ed] with [defendant] on a number of occasions actually and throughout the trial since Thursday, [and] that [defendant] is himself is going to decline the opportunity to testify on the stand." On the trial court's request, defense counsel reiterated this stating, "[defendant] has elected in his own volition but in reliance on my advice, that he's not going to testify. And he's decided that this is in his best interest." The trial court immediately asked defendant, "Is that correct, sir?" to which defendant responded, "Yes." Thus, the record reveals that defendant knowingly and voluntarily waived his right to testify.

Defendant further argues that the advice given to him by counsel whether he should testify constituted ineffective assistance. However, whether to call a witness is presumed to be a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Moreover, as previously noted, defendant could have elected to testify against counsel's advice

and waived that opportunity on the record. In addition, defendant's post-trial assertion that he acted in self-defense is wholly inconsistent with the physical evidence and his own lack of injuries. Finally, we note that defense counsel's strategy succeeded in obtaining an acquittal on the first-degree murder charge. Under these circumstances, we see no basis to find ineffective assistance of counsel and conclude that the trial court acted within its discretion in declining to hold an evidentiary hearing to review the basis of defense counsel's strategy or advice.[1]

Defendant also raises several sentencing issues. First, he asserts that the trial court abused its discretion when it scored offense variable (OV) 3 at 25 points. We review a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Absent an error in scoring or reliance on inaccurate information in determining the sentence, we must affirm a sentence that falls within the applicable guidelines range. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Under MCL 777.33(1)(c), 25 points are scored if "[l]ife threatening or permanent incapacitating injury occurred to a victim." When death is an element of the sentencing offense, 25 points must be scored under OV 3 if the victim sustained a life threatening or permanent incapacitating injury even if death ultimately resulted. *People v Houston*, 473 Mich 399, 405-407; 702 NW2d 530 (2005). Here, the victim was stabbed in the neck four times, resulting in life threatening injuries and, ultimately, her death. Thus, the trial court properly scored OV 3 at 25 points.

Defendant also contends that the trial court erred in considering defendant's refusal to admit guilt when it imposed defendant's minimum sentence. A review of the record reveals that the trial court noted defendant's lack of remorse at the sentencing hearing, not his refusal to admit guilt. Because a defendant's lack of remorse is a proper sentencing consideration, *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995), there is no error.[2]

[1] Defendant's statement of questions presented also alleges that defense counsel failed to adequately investigate, but his brief does not address the issue and so it is abandoned. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002).

[2] In light of our conclusion that defendant is not entitled to resentencing, we need not address his assertion that he is entitled to be resentenced before a different judge.

Finally, defendant argues that the Michigan sentencing guidelines violate *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v McCuller* (*On Remand*), 479 Mich 672; 739 NW2d 563 (2007), our Supreme Court reaffirmed its ruling from *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), that the Michigan sentencing guidelines do not violate *Blakely*. Therefore, defendant's claim is meritless.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro