

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIUS HOUSCH,

Defendant-Appellant.

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UNPUBLISHED

January 24, 1997

No. 186964

Recorder's Court

LC No. 94-002543

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,\* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to fifteen to thirty years' imprisonment. We affirm.

Defendant first argues that, although his trial counsel had notice of his history of mental illness, he failed to investigate the defense of diminished capacity and lack of criminal responsibility, and this failure constituted ineffective assistance of counsel. We disagree.

To support a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation was so prejudicial to defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Moreover, the defendant must overcome the presumption that the challenged act of counsel is sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We will not substitute our judgment for that of trial counsel regarding matters of strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant had at least two defenses available at trial: (1) diminished capacity and lack of criminal responsibility, and (2) alibi. There is no reason to believe that the defense of alibi that was

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

offered by defendant was not sound trial strategy. Further, the record reveals that defendant was insistent that this defense be proffered so that he could prove his innocence. This Court has previously held that where counsel concedes to the wishes of his client to argue innocence rather than raise the defense of insanity, the matter is one of trial strategy. *People v Newton*, 179 Mich App 484, 493; 446 NW2d 487 (1989). While trial counsel's choice of defenses may not have proven successful, we find that an alibi defense was reasonable under the circumstances.

Additionally, defendant argues that his counsel's failure to argue diminished capacity and lack of criminal responsibility constituted the denial of a substantial defense. The denial of a substantial defense occurs when the alleged deficiency of counsel resulted in counsel's ignorance of evidence which would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Here, when the evidence of defendant's mental illness is viewed in the aggregate, we conclude that the defense of diminished capacity and lack of criminal responsibility would have been disputable at trial. Therefore, defendant was not denied a defense which would have substantially benefited him. *Stanaway*, *supra* at 687. Defendant's counsel's assistance did not fall below an objective standard of reasonableness under prevailing professional norms and the representation did not so prejudice defendant as to deny him a fair trial. *Stanaway*, *supra* at 687-688.

Defendant next argues that the trial court erred by failing to make a finding regarding defendant's competency prior to accepting defendant's waiver of the right to a jury trial and proceeding with his nonjury trial. We disagree. The record reveals no request for an additional competency hearing prior to trial, nor a showing of necessity which would require that the trial court, sua sponte, order a competency hearing. *People v Garfield*, 166 Mich App 66, 73; 420 NW2d 124 (1988). During questioning of defendant prior to trial, defendant revealed no indication that his condition had changed since the trial court's previous finding of competency and defendant indicated a full understanding of the nature and object of the proceedings, as well as an ability to rationally assist in his own defense.

Defendant finally argues that the prosecutor improperly introduced evidence pursuant to MRE 404(b). Absent extraordinary and compelling circumstances, to preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection which is asserted on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994). Absent manifest injustice, a defendant waives the right to appellate review of bad acts evidence by failing to timely object to the same. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995); *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Here, defendant failed to object below to the testimony he now argues was improperly admitted. Based on our review of defendant's claim of error, no manifest injustice will result from our refusal to review this issue.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Marilyn Kelly  
/s/ Joseph B. Sullivan