STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND EUGENE LLOYD, JR., also known as RUFUS BROWN,

Defendant-Appellant.

UNPUBLISHED
March 31, 1998

No. 186131
St. Clair Circuit Court
LC No. 94-002308-FC

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life in prison without parole for the murder conviction and to two-years' imprisonment for the felony-firearm conviction. He now appeals as of right. We reverse and remand for a new trial.

On August 30, 1994, a number of contractors from the Energy Shield Company were resurfacing the roof of the Port Huron High School. The supervisor for the crew was Steve Johnson. Defendant, an employee of Energy Shield, began arguing with Johnson about what time defendant was to call in to work the following morning. The argument progressed into a fist fight. Defendant was eventually restrained but was released after he indicated that he did not wish to fight anymore. Defendant then walked to his car and retrieved a gun. He returned to the scene and fired several shots at Johnson. Johnson died a short while later from his wounds.

After the shooting, defendant was arrested at his grandparents' residence. The arresting officers testified that he was calm and cooperative. They also noted, however, that he appeared angry and agitated and that he began making spontaneous statements on the way to the police station. He admitted shooting Johnson, told the officers where they could find the rifle, and made a statement to the effect that his life was over. Defendant repeated each statement. When defendant arrived at the police station, he was interviewed by Detective Scott VanSickle. He told the detective that he had been

having mental problems and that he had been seeking help at the local mental health facility. VanSickle testified that defendant seemed angry throughout the interview and that he had a hard time staying focused on a particular point.

Defendant first argues that he was denied the effective assistance of counsel because his attorney failed to properly investigate and present the defenses of diminished capacity and insanity. We agree.

In order to succeed on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Defendant must overcome a strong presumption that counsel's conduct constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant must also show that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Id.* A criminal defendant is denied the effective assistance of counsel by his attorney's failure to investigate and develop a meritorious insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988); *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984).

In this case, defense counsel originally decided to present a factual defense rather than a defense based on insanity or diminished capacity. It was only after defendant specifically requested that defense counsel change his trial strategy and independently wrote a letter to the court requesting a clinical evaluation that defense counsel decided to pursue a diminished capacity defense. The original decision was inappropriate since counsel did not review the mental health reports cited by the expert for the prosecution and disregarded all evidence indicating that defendant did, in fact, have mental problems. The mental health reports suggest that defendant had "delusional thinking" and that he appeared "unable to control [his] impulse to act out aggressively." Defense counsel should have been aware of these reports given that defendant had told VanSickle that he had been seeking help at the local mental health facility. Despite the fact that the reports would have helped in counsel's cross-examination of the prosecution's expert witness, and would have helped the expert for the defense prepare her testimony, counsel did not even see the reports until after the trial was over. Therefore, we find that counsel's performance was below an objective standard of reasonableness under prevailing professional norms.

Furthermore, counsel's error was prejudicial. The defense only presented one witness on the diminished capacity defense, Dr. Virginia O'Reilly, and her testimony actually indicated that defendant did not suffer from diminished capacity. O'Reilly testified that defendant could take specifically intended actions, but that his ability to make choices was affected when his sense of danger was triggered. This testimony directly rebuts the defense of diminished capacity, which requires proof that defendant lacked the specific intent necessary for conviction of first-degree murder, *People v Denton*, 138 Mich App 568, 571; 360 NW2d 245 (1984), but supports an insanity defense, which requires proof that defendant lacked the substantial capacity to conform his conduct to the requirements of the law. MCL 768.21a(1); MSA 28.1044(1). Had counsel obtained defendant's mental health records, given them to O'Reilly, informed O'Reilly of the legal definitions of insanity and mental illness, cross-examined the prosecution's expert witness regarding the findings of mental health workers who believed that defendant was insane, subpoenaed the mental health workers that had previously evaluated defendant,

and requested that the trial court, as required by MCL 768.29a; MSA 28.1052(1), give the appropriate jury instructions prior to the experts' testimony and again at the conclusion of trial, the jury may well have returned a verdict of guilty but mentally ill. The severity of defendant's situation demanded that his trial counsel take all reasonable steps to prepare and present a viable defense. Since he did not do so, we reverse defendant's convictions and remand the case for a new trial.

To provide clarification for defendant's new trial, we note that the trial court erred in failing to give the jury the definitions of mental illness and diminished capacity prior to expert testimony on these issues and compounded the injustice in its closing instructions by failing to define mental illness and to instruct the jury to consider a verdict of guilty but mentally ill.

MCL 768.29a; MSA 28.1052(1) provides:

> (1) If the defendant asserts a defense of insanity in a criminal action which is tried before a jury, the judge shall, before testimony is presented on that issue, instruct the jury on the law as contained in sections 400a and 500(g) of Act No. 258 of the Public Acts of 1974 and in section 21a of chapter 8 of this act.
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> (2) At the conclusion of the trial, where warranted by the evidence, the charge to the jury shall contain instructions that it shall consider separately the issues of the presence or absence of mental illness and the presence or absence of legal insanity and shall also contain instructions as to the verdicts of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty with regard to the offense or offenses charged and, as required by law, any lesser included offenses.

The term "shall" rather than "may" in these sections indicates mandatory, rather than discretionary, action. *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). The prosecution argues that there is no authority indicating that an instruction must be given on the defense of diminished capacity, maintaining that it is not the same thing as insanity. We note, however, that diminished capacity is a subset of legal insanity, and the proper instructions must still be given. *People v Mangiapane*, 85 Mich App 379, 394-395; 271 NW2d 240 (1978) (noting that § 29(a) "manifests an intention to bring under one procedural blanket all defenses to criminal charges that rest upon legal insanity"). If defendant notifies the trial court in a timely manner that he will be asserting the defense of diminished capacity, and he does assert the defense at trial, the trial court will be required to properly instruct the jury on mental illness and diminished capacity.

Defendant also argues that the trial court abused its discretion in failing to order a nunc pro tunc competency evaluation. Because we are remanding this case for a new trial, we need not address this issue. However, if the court is presented with enough evidence to establish a bona fide doubt regarding defendant's competence to be retried, it must order a competency hearing.

Defendant raises several other arguments on appeal. However, because we reverse and remand on the basis of ineffective assistance of counsel, we do not need to address these issues.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.