STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERESA LAVONNE HEDGES,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 184257
Recorder's Court
LC No. 94-004548

Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction of first-degree felony murder, MCL 750.316; MSA 28.548. The trial court sentenced defendant to life imprisonment without parole. We affirm.

On January 7, 1994, defendant stabbed the victim, an eighty-five-year-old man, fifty-three times. Defendant claimed she acted in self-defense. It was the prosecution's theory that the killing occurred while defendant was committing or attempting to commit larceny. There was evidence to suggest that defendant took cash from the victim's house. After the stabbing, defendant left with the scissors she had used to stab the victim and with a magnifying glass that she had used to hit him.

On appeal, defendant first argues that the trial court failed to adequately instruct the jury on felony murder. In particular, defendant contends that the trial court failed to adequately clarify its instructions when a note sent from the jury during deliberations indicated that the jury was confused as to an essential element of the crime. We disagree. Defense counsel expressed satisfaction with the instructions given before the jury retired to deliberate and had no objection to the trial court's response to the note from the jury. Accordingly, we review this issue only to determine if manifest injustice resulted. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996).

The jury was instructed, consistent with CJI2d 16.4, that in order to convict defendant of felony murder, it must find that when defendant did the act that caused the death she "was committing or attempting to commit the crime of larceny." The trial court also instructed the jury that, for larceny, the property taken "must have been of some value at the time of the taking." During deliberations, the jury

sent an ambiguous written note to the court apparently requesting clarification regarding felony murder, second-degree murder, and involuntary manslaughter. A portion of the note read "1st Degree Felony Murder (*Does this include items not of monetary value)." In response, the trial court instructed the jury (1) that it did not understand the meaning of the note, (2) that the jury could choose either to clarify the note or to go on with deliberations, and (3) that it was excused for lunch. During the jury's lunch break, the parties interpreted the ambiguous note to be an inquiry into whether defendant could be convicted of felony-murder based on the fact that she took the scissors and a magnifying glass from the victim's house. Because the jury's inquiry was unclear, the trial court simply decided to reinstruct the jury on the elements of felony murder, larceny, second-degree murder, and involuntary manslaughter. Consequently, the jury was once again instructed that in order to convict defendant of felony murder, the jury must find that when defendant killed the victim she "was committing or attempting to commit the crime of larceny." The jury requested no further clarification before delivering its verdict.

A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). Jury instructions must include all of the elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). In order to convict a defendant of felony murder based on the underlying offense of larceny, the defendant must have intended to commit larceny at the time the homicide occurred. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). The felony-murder doctrine will not apply if the defendant's intent to steal the property was not formed until after the homicide. *Id.* Here, although there was evidence that defendant possessed the requisite intent for larceny prior to the killing, there was no evidence that defendant possessed an intent to steal the *scissors* or *magnifying glass* prior to the killing.[1] However, this does not mean that the trial court's instructions or its reaction to the ambiguous note from the jury were inadequate. Because the trial court's instructions on the law of felony murder were accurate and covered each element of the offense, and because the trial court sought to resolve any possible confusion by inviting the jury to clarify its ambiguous note, there was no manifest injustice and defendant is not entitled to relief on appeal. *Maleski*, *supra* at 521.

Defendant next argues that she was denied effective assistance of counsel. We disagree. A criminal defendant attempting to prove that trial counsel was ineffective bears a heavy burden. E.g. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, the defendant must show that

there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

First, defendant alleges she was denied effective assistance of counsel when defense counsel failed to engage in any voir dire of the prospective jurors. The trial court questioned the potential jurors during voir dire. Although this questioning revealed that three jurors knew or were related to victims of violent crime and that five knew or were related to police officers, in each case, the trial court determined that the juror's specific life experience would not affect his or her ability to render a fair verdict and to follow the law. On appeal, defendant fails to show how the results of the trial would have been different had defense counsel engaged in further questioning of the jurors. Accordingly, defendant has failed to meet the prejudice prong of the *Strickland* test. Moreover, defense counsel's testimony at the *Ginther*[2] hearing indicated strategic reasons for his decision to forego voir dire.

Second, defendant questions defense counsel's decision to reserve and then waive opening statement. Opening statement is the appropriate time to state the facts that will be shown at trial and the evidence that will be submitted to the jury. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). This Court has held that the decision whether to give an opening statement is a matter of trial tactics. *People v Hempton*, 43 Mich App 618, 624; 204 NW2d 684 (1972). Defense counsel explained that he waived his opening statement in this case because defendant's witnesses were "wishy washy" and he "didn't know exactly how they were going to come down." This fact provides a sound reason for defense counsel's decision to waive opening statement. If defense counsel had attempted to explain defendant's actions and present defendant's version of events during an opening statement, only to leave them unsatisfactorily established due to defendant's "wishy washy" witnesses his actions may have actually weakened defendant's claim of self defense. Moreover, defendant fails to show how she was prejudiced by defense counsel's decision to waive opening statement. Accordingly, defendant has failed to meet either prong of the *Strickland* test with respect to this particular allegation of ineffective assistance of counsel.

Third, defendant alleges she was denied effective assistance of counsel by defense counsel's failure to effectively cross-examine prosecution witnesses. Defense counsel testified at the *Ginther* hearing that defendant was very upset and nervous during the trial and that he and his paralegal did everything they could, including a game of tic-tac-toe, to keep her from going "to pieces." Although we do not mean to suggest that it is appropriate for a defense attorney to play games during the prosecution's case-in-chief, one game of tic-tac-toe made in an attempt to keep the defendant composed does not constitute ineffective assistance of counsel. Here, defense counsel was attentive enough to raise several objections during the course of the prosecution's case-in-chief and to cross-examine fifteen of the eighteen prosecution witnesses. In general, the decision to cross-examine a witness is regarded as a matter of trial strategy, and a defendant is entitled to relief only in those situations where the omission deprived her of a substantial defense. *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). Because defendant has not indicated precisely how trial counsel's method of cross-examination should have been different in this case, or what evidence would have been elicited had cross-examination been performed differently, she has failed to show the necessary prejudice.

Fourth, defendant alleges that defense counsel was ineffective in advising defendant not to testify on her own behalf. At the *Ginther* hearing, defense counsel testified that he advised defendant not to testify on her own behalf because her testimony could have been impeached by her prior convictions of bank fraud and attempted larceny. Defense counsel's stated strategy was to make defendant's claim of self-defense through her two police statements, which were not subject to cross-examination. In ruling on defendant's motion for a new trial, the trial court indicated that it would have allowed defendant to be impeached by her prior convictions. Moreover, defendant's testimony at the *Ginther* hearing revealed that she smoked crack cocaine hours before killing the victim. Because this evidence and the information about defendant's prior convictions would have been damaging to defendant's case, we cannot say that defense counsel's strategic decision to advise defendant not to testify constituted ineffective assistance of counsel.

Defendant further argues that defense counsel was ineffective in failing to investigate and call as witnesses Ken Duperron and Michael Cavataio, who would have offered testimony in support of two other witnesses that would have supported defendant's claim of self-defense. The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). 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). Here, the evidence against defendant was overwhelming. Testimony at trial indicated that, at the time of his death, the victim was a frail eighty-five-year-old man. Defendant killed the victim by stabbing him fifty-three times with a pair of scissors. Although her statement indicated that the victim originally came after her with a pair of scissors and a knife, defendant suffered only scratches and a cut finger during the altercation. Duperron's and Cavataio's testimony regarding the victim's physical condition and assaultive behavior in 1990 and 1991, if admissible, would have only been minimally relevant to the events of January 7, 1994, when defendant killed the victim.[3] Accordingly, defense counsel's failure to investigate and call these witnesses did not deprive defendant of a substantial defense. *Id.* at 526.

Fifth, defendant argues that defense counsel was ineffective in failing to move to suppress defendant's statements to the police. Because it was defense counsel's strategic intention to use defendant's (arguably) inculpatory statements to make her claim of self-defense, and because defendant failed to argue that a motion to suppress would have been successful, this allegation is without merit.

Sixth, defendant argues that defense counsel was ineffective in failing to request a jury instruction clarifying the necessary intent for felony murder after the jury sent the note to the trial court possibly indicating its confusion on that subject. Because the trial court's instructions on the elements of felony murder were accurate and complete, defendant cannot show that she was prejudiced by defense counsel's failure to request further instruction.

Finally, defendant argues that she was denied effective assistance of counsel as a result of the cumulative effect of defense counsel's errors. Although, when viewed in hindsight, defense counsel may not have provided the most effective representation possible under the circumstances, and defendant is undoubtedly unsatisfied with the results achieved, for the reasons stated above we cannot say that

defense counsel's representation was ineffective for purposes of defendant's Sixth Amendment right to counsel. See *Strickland*, *supra* at 687-688, 690-691.

Defendant next contends that the trial court abused its discretion when it precluded defendant from presenting the expert testimony of David Lawson, an attorney specializing in criminal law, during defendant's motion for a new trial. It was anticipated that Lawson would testify to the standard of practice of a criminal defense attorney in a capital case. Whether to admit expert testimony is a matter within the trial court's discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). The party proffering the expert bears the burden of persuading the trial court that the expert has specialized knowledge which will aid the fact finder in understanding the evidence and determining a fact in issue. *Id.* at 112. In this case, the trial court did not abuse its discretion in determining that the expert testimony would not be of aid to the court.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Hilda R. Gage

[1] As noted, *supra*, the evidence indicated that defendant took some cash from the victim's house at the time of the killing.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] Neither Duperron nor Cavataio had seen the victim in the three years prior to his death, so they could not have testified to his physical condition at the time of the murder. They could not have testified to the victim's reputation for violence in the community, because there is no indication that the victim had a reputation for violence in the community. Moreover, because there was no showing that defendant was aware of the past behavior of the victim, the proposed witnesses' statements would not have supported her claim of self-defense.