STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERESA LAVONNE HEDGES,

Defendant-Appellant.

UNPUBLISHED

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

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

JANSEN, J. (dissenting).

I respectfully dissent from the majority's holding that defendant was not denied the effective assistance of counsel at trial. I would reverse and remand for a new trial because I would find that counsel was ineffective in this case.

This case arises out of the stabbing death of Clyde Gage, who was eighty-five years old, on January 8, 1994, at his house in the City of Detroit. Defendant had been hired by the victim to assist him in taking care of his wife, who had Alzheimer's disease. Shortly after midnight, defendant went to the victim's home with her mother, Patricia Hedges, and her boyfriend, Michael Ambrow, in a taxicab. Defendant claimed in her police statement[1] that she went to the victim's home to borrow $100 to buy tickets for a Lions playoff game that was to take place during the afternoon of Saturday, January 8, 1994. While defendant went to the house, Hedges, Ambrow, and the cab driver remained in the cab for approximately twenty minutes. Defendant stated that the victim gave her $110 in cash, however, as she was attempting to leave through the front door, "something" hit her right hand and she turned around and hit the victim with her fist. Defendant saw scissors in the victim's hand and he was jabbing at her with the scissors. Defendant claimed that the victim grabbed her by the hair and pulled her into the hallway. As the two continued to struggle, defendant was able to grab the victim's hand that had the scissors, and she stabbed him in the chest area while he still had the scissors in his hand. When he stopped moving, defendant went to the bathroom, washed her hands, and then left the house. Defendant's defense at trial was self-defense.

The prosecution's theory of the case was that defendant stole money from the victim and perpetrated a murder during the commission of the larceny. The prosecution contended that the victim refused to give defendant any money, the parties argued, and defendant stabbed the victim with the scissors. The medical examiner testified that the victim suffered fifty-three stab wounds over his body, including sixteen stab wounds to the chest, five stab wounds to the back, seven stab wounds to the face, and nine stab wounds to the head. The prosecution further presented evidence that money ($1,400 in cash) was taken from the house.

The trial was conducted from January 17 to 24, 1995, and defendant was convicted as charged. Defendant was sentenced on February 13, 1995 to the statutorily mandated term of life imprisonment without the possibility of parole. Defendant filed her claim of appeal on March 23, 1995, and filed a motion for new trial claiming ineffective assistance of counsel in the trial court on November 30, 1995. An evidentiary hearing was held in the trial court on April 18, 1996, June 20, 1996, June 24, 1996, June 26, 1996, August 8, 1996, and September 27, 1996. In an order dated October 28, 1996, the trial court denied defendant's motion for a new trial.

In order to prove a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant so as to deprive her of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In order to show that counsel's performance was deficient, defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*, pp 687-688.

Defendant argues that trial counsel was ineffective for: (1) failing to conduct any voir dire of the jury and permitting the first twelve jurors to be seated without challenge, (2) failing to give an opening statement, (3) failing to effectively cross-examine prosecution witnesses, (4) failing to call three witnesses who would have supported defendant's defense of self-defense, or otherwise allow defendant to testify in her own behalf, (5) failing to move to suppress defendant's police statements, (6) failing to object to the trial court's response to the jury's request for additional instructions. I agree with defendant that she was denied the effective assistance of counsel for several of the reasons that she has alleged.

As defendant correctly notes, the trial court conducted voir dire of the potential jurors and allowed the attorneys to continue voir dire.[2] Defense counsel did not conduct any voir dire of the jury and did not exercise any peremptory challenges. At the evidentiary hearing, defense counsel explained that he routinely does not voir dire jurors because by engaging in voir dire, a party prematurely educates the opponent regarding trial strategy. Defense counsel also explained that he wanted a "black jury" because such would be beneficial to him. Apparently, counsel believed that only a black jury would be sympathetic to his side of the case.

If the purpose of voir dire is to discover possible sources of bias that would suggest a juror is unable to render a fair decision, *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994), then

defense counsel's decision to not conduct any voir dire is unsound trial strategy because counsel cannot discover possible sources of bias without asking any questions of the jurors. Moreover, a criminal defendant may need to question jurors on different areas from a prosecutor since they do not share the same goal. Further, defense counsel's explanation than he wanted a black jury is disturbing; this case had no racial overtones. Both the defendant and victim were white. Defense counsel should have been more concerned with finding a jury that could render a fair verdict respecting his *client*, not *him*, since defendant was on trial for a crime carrying a mandatory penalty of life without the possibility of parole. The aim should have been to find a jury that could render a fair verdict, regardless of race, but without asking any questions of the jurors defense counsel could not determine any potential biases of the jurors. Therefore, I find defense counsel's decision to not conduct any voir dire to be unsound trial strategy.

Defendant also contends that defense counsel was ineffective for failing to give an opening statement. Defense counsel explained that he first decided to reserve an opening statement because he did not know whether he was going to give one and ultimately waived opening argument because defendant's witnesses were "wishy washy" and counsel "didn't know exactly how they were going to come down."[3] Although the decision whether to forego opening argument is a matter of trial strategy, I again find that it was unsound trial strategy in this case.

The bare facts of this case, as presented by the prosecutor, were that defendant went to the victim's house to get money from him. When he did not willingly hand it over, she decided to take the money and stabbed the victim, an eighty-five-year-old man, fifty-three times with a pair of scissors. Defense counsel's decision to forego opening argument left the jury without any explanation of defendant's actions and did not present her version of events. This decision to not give opening argument is especially unsound in light of the fact that counsel did not really present an effective defense, as will be discussed more fully.

Defendant next argues that defense counsel failed to effectively cross-examine the prosecution's witnesses and was inattentive at trial. As noted by defendant, defense counsel's strategy was to impeach the prosecution's witnesses, which would have to be done through effective cross-examination. However, as stated by defendant at the evidentiary hearing, defense counsel was not attentive during trial as he told jokes and played tic-tac-toe with defendant at trial during the prosecutor's direct examination of certain witnesses. Defense counsel admitted playing a game of tic-tac-toe with defendant, but explained that defendant was in a very emotional state and that he and his paralegal did all they could to prevent defendant from "falling apart."

As stated by defendant, if it was defense counsel's strategy to rely on cross-examination to impeach the prosecution's witnesses, then attentiveness at trial would be of the utmost importance. Defense counsel's behavior of telling jokes and playing tic-tac-toe during the trial is highly inappropriate, and not in furtherance of his stated strategy to impeach the prosecution's witnesses through vigorous cross-examination. Accordingly, I find that counsel's conduct in this regard fell below an objective standard of reasonableness.[4]

Defendant next argues that defense counsel was ineffective because he failed to adequately investigate and failed to call witnesses at trial who would have supported defendant's claim of self-

defense. At the evidentiary hearing, it was evident that two witnesses could have testified regarding the victim's past violence, thus supporting defendant's claim that he was the first aggressor. Ken Duperron testified at the evidentiary hearing that he and his girlfriend had rented from the victim in 1990. Duperron would have testified as to the victim's agility and strength and the fact that the victim had once attempted to stab Duperron with a screwdriver. Michael Cavataio also testified at the evidentiary hearing that he lived in the victim's house in March 1991. Cavataio testified as to the victim's strength and a "confrontation" he had with the victim when he was one day late with rent. Certainly, Dupperon's testimony relative to the victim's past proclivity for violence would have been crucial to support defendant's claim of self-defense and that the victim was the first aggressor. Moreover, defense counsel was aware of Dupperon before trial.

In this case, defense counsel called Ronald Churin, the victim's son-in-law, to the stand. Churin has previously been called by the prosecutor during his case-in-chief. On direct examination, defense counsel only elicited testimony that, after collecting things from the victim's house, Churin found videotapes, none of which were pornographic. Defense counsel also called Steven Shomo, the victim's next door neighbor of approximately six years. Shomo was able to testify that the victim was "pretty well fit," and that the victim would do yard work, mow the lawn, and shovel the sidewalk. Importantly, defense counsel offered no evidence regarding the victim's reputation for violence in the community.

In this case, I are unable to discern any trial strategy for not calling Dupperon and Cavataio to support defendant's claim of self-defense. Defense counsel did not produce any witness who testified as to the victim's reputation for violence in the community, and thus defendant's claim of self-defense, especially under the facts of this case was substantially weakened. As noted in *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996), it must be considered whether the actions of trial counsel were in pursuance of trial strategy. Here, there is no trial strategy offered by defense counsel to not call supporting witnesses who had personal knowledge as to the victim's tendency toward violence.

Defendant also argues that defense counsel was ineffective for failing to object to the trial court's reinstruction to the jury. There is some merit to this argument as well. During deliberations, the jury sent a note to the trial court that stated, "Please give clarification on charges. Rules per judge: 1st degree felony murder (*does this include items not of monetary value). 2nd degree murder. Guilty of involuntary manslaughter." The trial court, after reading the note, told the attorneys, "I don't know what any of this means." The trial court then told the jury that it did not understand the note and was not possible for it to answer the note. The trial court told the jurors that they could either clarify the note or continue to deliberate. After the jury was excused for lunch, the prosecutor offered an explanation that the jurors were asking about the scissors and magnifying light that were taken from the house by defendant after she had stabbed the victim.

Following lunch recess, the jury sent a second note asking the trial court to define the elements of "not guilty," "guilty of 1st deg. felony murder," "guilty of 2nd deg murder," and "guilty of involuntary manslaughter." Thereafter the trial court reinstructed the jury, using the standard jury instructions, on the elements of felony murder, second-degree murder, and involuntary manslaughter. Defense counsel did not object to the trial court's reinstructions.

Although the trial court's instructions regarding the elements of felony murder, second-degree murder, and involuntary manslaughter are all technically correct, it is defendant's contention that the jury may have been confused that the larceny of the scissors and magnifying light, which were admittedly taken by defendant after she stabbed the victim, could not form the underlying felony to support the felony murder conviction. In other words, if the jurors believed that the larceny of the scissors and magnifying light was the underlying felony to support felony murder, there was no evidence that defendant had intended to steal those items at the time the homicide occurred. This is crucial because the felony murder statute requires that the murder be committed in the perpetration or attempted perpetration of larceny of any kind. MCL 750.316; MSA 28.548. Therefore, defendant must intend to commit the underlying felony at the time the homicide is committed. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). Further, the felony-murder doctrine does not apply if the intent to steal property is not formed until after the homicide. *Id.*

It would have been preferable for the trial court to have informed the jury, after the first note, that the defendant must have intended to commit the underlying felony (larceny) at the time the homicide occurred, and that the felony-murder doctrine cannot apply where the intent to steal property is not formed until after the homicide, and defense counsel should have objected on this basis.

Based on all of the foregoing reasons, I conclude that defendant was denied the effective assistance of trial counsel. Defense counsel's trial tactics did little, if anything, to support defendant's claim of self-defense. Defense counsel failed to conduct any voir dire to determine any biases on the part of the jurors and failed to give an opening statement, thereby depriving the jury from understanding defendant's defense and her version of events, especially in a case where the facts are otherwise so brutal. Defense counsel's conduct of telling jokes and playing tic-tac-toe is particularly disturbing where his proffered strategy was to impeach the prosecution's witnesses through cross-examination which could not be accomplished if counsel was not paying attention to direct examination. Further, counsel failed to call witnesses who could have supported defendant's claim of self-defense. Taken together, this conduct shows that counsel's performance fell below an objective standard of reasonableness because the stated trial strategy was unsound. Moreover, defendant has shown a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. That is because counsel failed to adequately present any defense on defendant's behalf. Without any supporting evidence, defendant's claim of self-defense was ineffectual.

Accordingly, I would find that defendant was denied the effective assistance of trial counsel and would reverse and remand for a new trial.

/s/ Kathleen Jansen

[1] Defendant did not testify at trial.

[2] Our Supreme Court has recently noted that where the trial court conducts voir dire, a sufficiently probing method must be employed to elicit information concerning exposure to publicity. *People v*

Jendrzejewski, 455 Mich 495, 509; 566 NW2d 530 (1997). The trial court did not dismiss any potential jurors after its initial questions.

[3] In this regard, if counsel was unaware of how defendant's own witnesses were going to testify, then I question whether counsel was truly prepared for trial.

[4] Other evidence of defense counsel's lack of preparation for trial is indicated by the fact that counsel admitted at the evidentiary hearing that he misplaced defendant's file on the day before trial and he had to get another copy of the file from the prosecutor's office.