STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN P. ROBINSON,

Defendant-Appellant.

UNPUBLISHED
February 9, 1999

No. 203179
Montcalm Circuit Court
LC No. 96-000072 FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

This case arises from an incident in 1996 in which an elderly woman was strangled to death with a rubber oxygen tube in the course of a robbery of her apartment. The jury found defendant guilty of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and the trial court sentenced defendant to life in prison without parole. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court deprived him of his right to present a defense when it excluded expert testimony offered to establish defendant's diminished capacity. This argument is without merit. Defendant's attorney offered the testimony to show that defendant lacked the specific intent to kill, on the ground that defendant should then be convicted of nothing greater than second-degree murder. However, defendant was charged with first-degree *felony* murder, the intent requirement for which is the same as that for second-degree murder, that the perpetrator acted with at least a reckless disregard for the high probability that his actions would result in death or serious bodily harm. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993) (second-degree murder); *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993) (first-degree felony murder). The effect of felony-murder law in this state is to "raise what would otherwise be second-degree murder to first-degree murder—for the sole purpose of increasing punishment." *People v Harding*, 443 Mich 693, 711; 506 NW2d 482 (1993) (Brickley, J., joined by Griffin and Mallett, JJ.). Because first-degree felony murder is not a specific intent crime, evidence offered to disprove specific intent in defense of that charge may properly be excluded as extraneous, MRE 403, if not irrelevant, MRE 402.

However, defendant argues on appeal that the expert should have been allowed to testify in order to show that defendant lacked the specific intent required for larceny, the felony on which the

felony-murder charge was predicated. Although this point was not raised in the proceedings below and thus not preserved for appeal, this Court may consider unpreserved issues where failure to do so would result in manifest injustice. *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). There is no manifest injustice in this instance. Defense counsel stated at trial that the expert in question had concluded that defendant was aware of the nature of his actions as concerned his robbing of the victim. There is no manifest injustice in declining to allow a party to develop an argument on appeal that his lawyer expressly disavowed at trial. See *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995) (a defendant may not assign error on appeal to something that his own lawyer deemed proper at trial).

Defendant in turn argues that his trial lawyer's failure to offer the expert's testimony for the purpose of disproving the specific-intent element of the underlying felony constituted ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to result in deprivation of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Failure to present witnesses can constitute ineffective assistance only where that failure deprived the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated on other grounds 453 Mich 902 (1996). "A defense is substantial if it might have made a difference in the outcome of the trial." *Hyland, supra* at 710.

In this case, our review of the record leads us to agree with defendant that his trial lawyer both misunderstood the intent requirements for felony murder and incorrectly told the court that the expert had concluded that defendant understood that he was perpetuating a robbery. Defendant thus was deprived of any possibility of benefiting from the expert's opinion, which, according to the expert's report, was that defendant could not have formed the specific intent to commit *any* crime. However, in light of defendant's admission at trial that he went to the victim's apartment to steal, plus his signed confession to that effect, we conclude that had defendant's attorney offered the expert's testimony for the purpose that would have rendered it admissible, that evidence would likely nonetheless not have affected the outcome of the trial. Thus, although defendant has identified some errors on the part of defense counsel, those errors are not sufficient to warrant appellate relief on the ground of ineffective assistance of counsel.

Defendant next argues that the trial court erred when it denied his motion for a change of venue. A trial court's decision on a motion for a change of venue should not be disturbed on appeal except in the face of a palpable abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). We find no abuse of discretion here.

Criminal defendants should normally be tried in the county where the offenses charged allegedly occurred. *Jendrzejewski, supra* at 499; MCL 600.8312; MSA 27A.8312. However, a court has discretion to order a change of venue in the interests of justice. *Jendrzejewski, supra* at 500; MCL

762.7; MSA 28.850. Justice demands a change of venue if pretrial publicity has been so ubiquitous and unrelenting that the jury must be presumed unable to render impartial judgment because of its influence. *Id.* at 501. Where a trial court denies a motion for change of venue predicated on the effects of pretrial publicity, an abuse of discretion may be found where inflammatory publicity "saturated the community to such an extent that the entire jury pool was tainted . . . ." *Id.* at 500-501.

Defendant bases his assertion of the existence of inflammatory publicity on the coverage of the case within a single newspaper, to which the evidence shows only twenty percent of the community subscribed. This falls far short of demonstrating a likelihood that defendant's jury was necessarily tainted by pretrial publicity.

Finally, defendant argues that the trial court erred when it ordered that defendant remain in leg irons at trial. We review the court's decision in this regard for an abuse of discretion in light of all the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). The shackling of a criminal accused at trial is disfavored, and is proper only to prevent the accused from attempting escape, injuring others, or otherwise disrupting the proceedings. *Id.* at 404. In this case, the trial court ordered that defendant remain shackled, citing only the general grounds that defendant was accused of a violent crime as a second offender. Because the court identified no unusual risk of escape, injury, or disruption, we hold that the decision to keep defendant in leg irons was an abuse of discretion. However, "an error or defect in anything done or omitted by the court . . . is not ground for granting a new trial, for setting aside a verdict, or for . . . otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.513(A). Given the overwhelming evidence of defendant's guilt, we conclude that there is no reasonable possibility that had defendant not appeared in leg irons the outcome of the trial would have been different. Thus we hold that the trial court's improper shackling of defendant was in this instance harmless error. See *People v Gearns*, 457 Mich 170, 203-204 (Brickley, J., joined by Mallett, C.J.), 207 (Cavanagh, J., joined by Kelly, J.); 577 NW2d 422 (1998) (preserved nonconstitutional error is harmless unless it is highly probable that the error affected the outcome).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell