STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELA DIAN FISHER,

Defendant-Appellant.

UNPUBLISHED
October 1, 1999

No. 206319
Berrien Circuit Court
96-3845 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant Angela Dian Fisher was convicted of first-degree 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). We affirm.

This appeal arises from the shooting death of defendant's daughter, Jaden Fisher, on July 31, 1996. Joel Genereaux, defendant's brother-in-law, moved to Michigan in October 1995. He and defendant had an affair that began in January 1996. As the relationship developed, defendant told Genereaux she wanted to leave her husband and move to Florida with Genereaux. Genereaux told defendant that although she could move to Florida with him, he could not take care of the victim. In July 1996, following an altercation between Genereaux and defendant's husband, Genereaux moved back to Florida. Defendant began telephoning Genereaux two or more times per day.

Defendant approached two friends in the days preceding the shooting and asked them to kill the victim. Dana Zerbe and Bobby Jo Green both testified that defendant had told them that she tested positive for HIV, and that she needed someone to kill the victim. Both men refused to do as defendant asked. Zerbe said that he did not approach the police until after the shooting because he did not believe that defendant actually wanted the victim killed; he thought defendant was acting erratically because she had learned of the HIV infection. However, after he learned of the shooting, he contacted police.

On the day before the shooting, defendant called Genereaux and told him that she had given the victim sleeping pills in her yogurt earlier that week, saying she wanted the victim to die in her sleep.

Genereaux testified that he did not believe defendant had tried to kill the victim. On the day of the shooting, defendant called Genereaux three times. The first time, she and Genereaux spoke for over two hours; during this call, defendant told Genereaux that she was ready to leave and come to Florida. During the second call, she told Genereaux she had found another way to get rid of the victim and that she would see him soon. At 2:30 p.m., she called and asked Genereaux if her husband's guns were loaded. Genereaux told her he did not know, suggesting that defendant call her husband. He also suggested that she "take them apart and look at them."

At 2:47 p.m., defendant called 911 and reported that the victim had been shot. When police arrived, she told them that she was in the laundry room when she heard a gun go off. She went to the bedroom, where she had put her husband's guns on the bed while she cleaned, and found the victim. She gave the same version of events to Rolland Labaumbard of the Berrien County Sheriff's Department. When he informed defendant that Zerbe had called their office, she denied asking him to kill the victim. She admitted telling Zerbe that she had tested positive for HIV; she also admitted that she had not, in fact, been tested. On September 18, 1996, defendant was interviewed by Shawn Loughrige of the state police. She first gave Loughrige the same version of events that she had given Labaumbard. She then admitted that she cocked the gun and pulled the trigger.

Before trial, defendant filed notice that she intended to assert an insanity defense. Defendant and the prosecution each introduced the expert testimony of psychologists. Frederick T. Sulier testified that defendant was insane at the time of the offense because she suffered from a borderline personality disorder. He had prepared two reports containing his conclusions; he admitted that in the first report, he had concluded that defendant did not meet the criteria for legal insanity. Thomas D. Shazer testified that in his opinion, defendant was not legally insane at the time of the shooting.

Defendant contends that she was denied effective assistance of counsel when her attorney failed to move for a mistrial or move that two jurors be stricken from the panel when the jurors informed the court that they had been patients of Sulier. We disagree. Because defendant failed to obtain a hearing in the trial court, review of her claim is foreclosed unless the record contains sufficient detail to support her position. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *Id*., 687. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). In this case, the jurors notified the court before Sulier began to testify that they had been his patients. Defendant contends that no reasonable trial strategy could have justified the decision to leave the jurors on the panel. We disagree. Counsel

could have concluded that the jurors would be more likely to receive Sulier's testimony favorably because of their prior relationship with him. Even if we assume that the failure to object was error, however, we could not conclude that defendant was harmed, since the court removed the jurors before the close of testimony. Defendant speculates that the jurors could have spoken to the other jurors. This ignores that both jurors said that they had not spoken to the other jurors about their knowledge of Sulier before they spoke to the court, and that the court directed them not to speak to the other jurors after it learned of the prior relationship. Defendant now requests a hearing in the trial court; we decline defendant's invitation, since defendant did not make a timely request. MCR 7.211(C)(1). Defendant has failed to show a right to relief.

Defendant also argues the trial court erred in failing to give an instruction on the cognate lesser offense of voluntary manslaughter. We disagree. An instruction on a cognate lesser offense must be given, when requested, if there is sufficient evidence that would support a conviction of the cognate lesser offense and the cognate lesser offense is of the same class or category as the charged offense. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999); *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Voluntary manslaughter is proven by showing that (1) the defendant killed in the heat of passion, (2) the passion was caused by adequate provocation, and (3) there was not a lapse of time during which a reasonable person could control her passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). It is the element of provocation which distinguishes voluntary manslaughter from murder. *Id*. The determination of whether provocation is adequate turns on whether it would cause a reasonable person to lose control. *Id.* In this case, the only evidence that could conceivably support a conclusion that defendant was provoked was Sulier's testimony that defendant had told him Genereaux threatened to report defendant to the "Indian Council." This does not constitute adequate provocation. Moreover, although the jury was instructed on second-degree murder, the jury chose to convict of first-degree murder. Thus, any error in failing to instruct on voluntary manslaughter was harmless. *Id.* at 520.

Defendant contends that the evidence was insufficient to support the guilty verdict. We disagree. Insanity is an affirmative defense, which defendant must prove by a preponderance of the evidence. MCL 768.21a; MSA 28.1044(1). In this case, the defense and prosecution introduced conflicting testimony on defendant's sanity. The weight and credibility to be given to this testimony was for the trier of fact to resolve. See *People v Ross*, 145 Mich App 483, 493; 378 NW2d 517 (1985); *People v Duffy*, 67 Mich App 266, 269; 240 NW2d 771 (1976). Defendant also points to evidence in the record that she engaged in erratic behavior both before and after the murder. The evidence indicated that although defendant doted on the victim before she became involved with Genereaux, her involvement with the victim waned after the affair began. A rational trier of fact could have concluded that defendant lost interest in the child when she and Genereaux became involved. Moreover, we reject defendant's contention that her solicitation of Zerbe and Green was evidence of insanity; nothing in this evidence shows that defendant did not appreciate the quality and nature of her conduct or its wrongfulness. MCL 768.21a(1); MSA 28.1044(1)(1). A rational trier of fact could have concluded that defendant failed to carry her burden of proof.

Defendant contends that the verdict was against the great weight of the evidence. Because defendant did not raise this claim in a motion for new trial, we will not address this contention. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski