

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT L. WILSON,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 211453

Muskegon Circuit Court

LC No. 97-141051 FC

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). He was sentenced to life imprisonment without parole for the murder conviction and to a two-year mandatory prison term for the felony firearm conviction. Defendant appeals as of right. We affirm.

This case arises from the August 23, 1997, murder and larceny of Robert McIntire. On August 23, 1997, McIntire's bullet-ridden body was found covered with white paint on the floor of a house at 2308 Elwood in the city of Muskegon where he had been painting the home's interior the same day. In a taped interrogation that was played to the jury, defendant admitted that on August 23, 1997, he "unloaded" a .22 revolver into McIntire's body after McIntire refused to surrender his wallet. Defendant denied, however, taking McIntire's wallet or pouring white paint over McIntire's body.

Defendant first argues that defense counsel's minimal effort to argue for a conviction of second-degree murder, coupled with counsel's references to defendant's admission that he shot McIntire, denied defendant the effective assistance of counsel. Because defendant failed to request an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), we review defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

A defendant must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994). The defendant must first

demonstrate that counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Then, the defendant must demonstrate that counsel's deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *Id.*

Defendant's ineffective assistance of counsel claim is based upon select excerpts from defense counsel's closing argument. By taking the excerpts out of context, defendant has attempted to demonstrate that defense counsel conceded defendant's guilt to the first-degree felony murder charge, and that defense counsel did not effectively advocate for a conviction of second-degree murder. To the contrary, defense counsel was exercising his broad discretion in defending his client.

The Michigan Supreme Court has elaborated on the discretion afforded to a criminal defense attorney:

Every criminal defense attorney must make strategic and tactical decisions that affect the defense undertaken at trial. . . . Defense counsel must be afforded "broad discretion" in the handling of cases, which often results in "taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat." [*Pickens, supra*, 324-325 (quoting *People v Lundberg*, 364 Mich 596, 600, 601; 111 NW2d 809 (1961)).]

In the present case, defense counsel had a difficult case because the jury heard defendant's taped confession in which defendant explained that he planned on robbing McIntire, and that he "unloaded" his revolver on McIntire when McIntire tried to grab the revolver. Defense counsel argued that although defendant initially intended to rob McIntire, defendant changed his mind by the time defendant shot McIntire. By attempting to negate the underlying larceny or attempted larceny, defense counsel argued that the jury should convict defendant of second-degree murder.

Further, defense counsel argued that because defendant confessed to shooting McIntire, there was no reason why defendant would not admit to the less-serious offense of taking McIntire's wallet. Defense counsel explained to the jury that Cornelius "Euggie" McGruder and Marvin Oliver had access to the house where McIntire was shot, and testimony suggests that they knew that McIntire carried money while working. Defense counsel argued that McGruder or Oliver acted alone when taking McIntire's wallet. Finally, defense counsel asked the jury to consider that defendant, who was 17 years old, was remorseful about shooting McIntire, and that he was the product of the Projects.

Based on these facts, defendant cannot successfully claim that defense counsel conceded defendant's guilt to the first-degree felony murder conviction or that defense counsel deficiently advocated for a second-degree murder conviction. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and . . . this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Because defendant has failed to demonstrate that defense counsel performed deficiently, there is no need to address whether defendant was prejudiced by defense counsel's performance.

Defendant next argues that the trial court erred by instructing the jury on the offense of aiding and abetting a larceny.¹ However, defense counsel expressly acquiesced to the instruction. Thus, defendant has waived the alleged error by expressly acquiescing to the jury instruction. See *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998) (noting that “[a] defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court.” *Id.*).

Thus, we review defendant’s waived claim of nonconstitutional error only if necessary to avoid manifest injustice. MCL 769.26; MSA 28.1096; *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). Manifest injustice occurs when an erroneous jury instruction pertained to a basic and controlling issue in the case, *id.* at 144, and the defendant bears the burden of establishing error requiring reversal stemming from the issuance of an inappropriate jury instruction. *Id.* After a thorough review of the record, we are satisfied that no manifest injustice resulted from the trial court’s decision to instruct the jury on the offense of aiding and abetting a larceny.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

¹ Defendant was not charged with aiding and abetting a larceny. However, to prove felony-murder, the prosecutor had to prove the underlying felony of larceny. Thus, the judge instructed on the offense, replacing the word “charged” in the standard instruction with the word “alleged” to avoid confusion.