STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY BRYAN FELTON,

Defendant-Appellant.

UNPUBLISHED
April 21, 2000

No. 209923
Shiawassee Circuit Court
LC No. 97-000357-FC

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), for which he was sentenced to life imprisonment without parole. We affirm.

Defendant argues that his attorney's refusal to advance an intoxication defense amounted to ineffective assistance of counsel. We disagree.

To the extent that defendant's claim of ineffective assistance of counsel depends on facts outside the lower court record, it was incumbent upon defendant to make a testimonial record at the trial court level to evidentially support his claim and exclude hypotheses consistent with the view that his trial lawyer represented him adequately. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), citing *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Defendant's failure to request a new trial or an evidentiary hearing forecloses appellate review of this issue unless the record contains sufficient detail to support his claim. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To establish a claim of ineffective assistance of counsel, defendant must show: (1) that his counsel's performance was deficient, in that his mistake was so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment; and 2) that the deficient performance prejudiced the defense. *Hoag, supra* at 5; *Barclay, supra* at 672. Further, defendant must overcome the strong presumption that the challenged conduct was sound trial strategy, and must establish a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Hoag, supra* at 6.

At the conference on jury instructions, defense counsel stated that he did not intend to use intoxication as a defense, despite defendant's testimony that he was intoxicated on drugs when he killed Porter. Defendant expressed agreement with defense counsel's decision on the intoxication issue. The prosecutor stated that, had defendant decided to advance an intoxication defense, he was prepared to present "at least three witnesses" to address the intoxication issue, and that two of defendant's fellow inmates were prepared to testify that defendant told them that his claim of intoxication was "a scam."

On this record, we find that defendant has failed to establish that defense counsel's decision not to present an intoxication defense at trial was anything other than sound trial strategy. *Hoag, supra*. Defense counsel was cognizant that he could argue intoxication, but opted instead to argue that the shooting was accidental, in that it was unplanned and undeliberated. Defendant expressly agreed with defense counsel's decision. While defendant is correct that intoxication can be a defense to first-degree murder, *People v Garcia*, 398 Mich 250, 259; 247 NW2d 547 (1976), an attorney is not required to advance a defense simply because the evidence might support it; instead, the choice of closing argument and what defenses to assert are matters of trial strategy which this Court is loathe to second-guess, even if the strategy does not prove successful. *In re Ayres*, ___ Mich App ___; ___ NW2d ___ (Docket No. 216523, rel'd 12/7/99) slip op pp 7-8. Accordingly, defendant's ineffective assistance of counsel claim must fail.

Defendant further argues that his attorney's refusal to advance the intoxication defense denied him his constitutional right to present a defense. We disagree. Defendant failed to raise this issue below. To succeed on this claim, defendant must establish the existence of a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). This Court will reverse only if defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

A criminal defendant has a state and federal constitutional right to present a defense. Const 1963, art 1, § 13; US Const, Ams VI, XIV; *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). Here, defense counsel carefully chose defendant's defense, and defendant expressly agreed to argue to the jury that he had not premeditated and deliberated the killing, and that he shot Porter because he mistakenly believed Porter was going to shoot him. On this record, we find no plain error affecting defendant's substantial rights. See *Carines, supra*.

Finally, defendant argues that the trial court was obligated to sua sponte instruct the jury that intoxication was a defense to the crime of first-degree murder. We disagree.

The trial court's failure to instruct on any point of law is not a basis for setting aside the jury's verdict unless the instruction was requested by the accused. MCL 768.29; MSA 28.1052; *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999). Because defendant did not ask the trial court to give an instruction on the defense of intoxication and, in fact, expressly

disavowed this defense, the trial court's failure to instruct the jury sua sponte on intoxication is not a basis for setting aside the jury's verdict.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff