STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 1, 2000
v	No. 199958 Wayne Circuit Court
TRAVIS HARDEN, Defendant-Appellant.	LC No. 95-008510-FY

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to twenty to fifty years' imprisonment. We affirm.

Defendant claims on appeal that, since lay testimony "suggested" that he was legally insane at the time of the killing, there was insufficient evidence to support a verdict of guilty of second-degree murder. When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Mass*, 238 Mich App 333, 335; 605 NW2d 322 (1999).

The offense of second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Defendant's claim that there was insufficient evidence presumably concerns the element of malice.[1] The element of malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464. Malice for second-degree murder can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*,

[1] Defendant simply claims there was insufficient evidence to support his conviction, without specifying in what regard the evidence was lacking.

230 Mich App 459, 462; 584 NW2d 610 (1998). Actual intent to harm or kill is not required, and only the intent to do an act that is in obvious disregard of life-endangering consequences need be shown. *Goecke*, *supra* at 466.

In 1994, the Legislature amended the insanity statute to provide that the insanity defense is an affirmative defense and that the defendant has the burden of proving the defense by a preponderance of the evidence. The relevant portion of the statute provides as follows:

> (1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in . . . [MCL 330.1400a; MSA 14.800(400a)] . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.
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> * * *
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> (3) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence. [MCL 768.21a; MSA 28.1044(1).]

Mental illness is "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g); MSA 14.800(400)(g).

At the preliminary examination, defense counsel attempted to solicit testimony that the victim was a homosexual. He made an offer of proof, "[I]n this case we have a homosexual assault made on my client. You have a fight. That's it." Counsel further stated, "What the gist of the case is that my client says this man tried, as he says, to f-u-c-k him, and then they got into a fight. That was all he remembers." Statements of counsel are not evidence.

Counsel did not file and serve before trial a notice of his intention to assert the defense of insanity as required by MCL 768.20a(1); MSA 28.1043(1)(1). Prior to trial, the court ordered an evaluation relevant to criminal responsibility, and defendant was examined by Dr. Donald Aytch, a licensed psychologist with the then-Detroit Recorder's Court Psychiatric Clinic. Defendant, however, did not request an independent psychiatric examination as provided for by MCL 768.20a(3); MSA 28.1403(1)(3).

The prosecution presented its case showing that defendant was found on the seventh floor landing of a stairwell of the downtown Detroit YMCA, standing over the victim with blood on his clothing.[2] The victim was a forty-nine-year-old man who weighed less than one hundred pounds. He

[2] Defendant was twenty-nine years old, 5'8" tall and weighed 228 pounds. One witness compared him to "The Hulk."

lived and worked at the YMCA where he was killed. His death was caused by severe blunt trauma to the head allegedly caused by his head being bashed against the floor five to seven times. His body also showed signs of strangulation, including a torn jugular. The crime scene technician testified regarding blood splatters up to twelve feet in length.

Several prosecution witnesses testified regarding defendant's behavior before and after the killing. One witness, a janitor, saw defendant sitting on the front steps of the YMCA the evening before the killing. He was described by the witness as "lucid and of clear mind," and talking quietly concerning bible study. The day of the killing, defendant was seen on the seventh floor near a pay phone and the freight elevator. At one point, defendant had a bag of trash and the janitor made him give it back so it could be placed in the dumpster. Although the behavior was considered odd, the witness did not think defendant posed a threat at that point.

Defendant was reported to the front desk as an unauthorized person in the stairwell. Two female employees went to the seventh floor to investigate and asked the janitor, who was cleaning the seventh floor restroom, to accompany them. The janitor heard pounding and all three witnesses heard yelling and screaming, as though someone were trying to get out of the stairwell.[3] The janitor and the two female witnesses proceeded to the stairwell, pushed opened the door, which had been propped open with the victim's slipper.

When the door was opened, defendant walked past the witnesses and proceeded down the seventh floor hallway towards the elevators and another stairwell. He was singing or shouting words to hymns with his hands elevated, pacing and kneeling. When the janitor told defendant to move to the other end of the building, he stopped singing and complied. Defendant was described as very restless, distraught and somewhat confused for ten to fifteen minutes following being released from the stairwell. He then ran down a different flight of stairs and left the building.

Defendant was observed walking in the street, yelling and screaming and waving his arms. At one point, he laid down in the street for a second or two. He then walked to Woodward Avenue where he again laid down in the street. When officers arrived, defendant jumped up and onto the hood of the scout car and, with one kick, caved in the windshield. He then jumped onto the roof of the car, kicked it in, jumped off and ran down Woodward, where he was then apprehended by officers.

The prosecution sought to present Dr. Aytch, who was a rebuttal witness, out of order. Defense counsel stated, "I'm well aware of the fact that [MCL 768.21a; MSA 28.1403(1)] does require, makes this an affirmative defense. And I don't have any real objection. I think that justice will be served as we begin to explore that particular area. And if he wants to put [Dr. Aytch] on, that's fine. I have no objection."

Dr. Aytch performed a criminal responsibility examination of defendant on September 18, 1995. He testified that defendant did not cooperate on the intelligence test and that discrepancies in his

[3] The stairwell fire doors locked when one entered from the hallway and the only way out of the stairwell was on the first floor.

answers to very simple questions led him to conclude that, "perhaps," defendant was "attempting to appear to have intellectual deficits when, in fact, there were none." Dr. Aytch concluded as follows:

> There was no evidence of chronic mental illness. There was slight evidence to suggest that Mr. Harden is, what's called histrionic. Which means that he's kind of overreactive to certain social situations. He sometimes gets kind of impulsive and he may have a tendency to overreact emotionally.
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> But with regard to several psychotic measures, like whether or not he has a borderline personality, whether or not he has paranoid schizophrenia, he was within normal limits on all three of those measures.

Dr. Aytch commented, "[B]ased on his presentation during my evaluation with Mr. Harden, there was a lot of inconsistency in his self-report to indicate that he was purposefully attempting to appear sick." Dr. Aytch testified that he believed defendant to be a malingerer. From the tests administered, Dr. Aytch concluded that defendant was neither mentally retarded nor mentally ill, that he was very much aware of the fact that what he did was wrong, and that he knew he engaged in unlawful behavior. Dr. Aytch was cross-examined extensively by defense counsel.

After Dr. Aytch's testimony, the following exchange took place between the court and defense counsel:

> THE COURT: I want the record to also indicate the following, if it's correct. As I understand, your defense here went towards, is going towards the complainant being a homosexual, that advances were then repelled by your client, resulting in what happened.
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> [DEFENSE COUNSEL]: Basically. We really don't know, but I think that's the only reasonable –
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> THE COURT: The reason I ask that, though, is because the defendant was not referred to any independent psychologist or psychiatrist. I wanted to make sure that that was a matter of trial tactic, as to where you were going, that's why you didn't do it; would that be correct?
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> [DEFENSE COUNSEL]: Well, I didn't know what the facts were, in fact, to tell the truth, because I'm in a situation where my client can't help one bit in terms of remembering what went on. And that's been the case constantly, we haven't been able to tell.
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> THE COURT: You are a very experienced counsel. You've been around here a couple more years than I have, all right, and I want to make sure that the tactics you've taken in this case were a matter of trial tactics and not ineffective assistance of counsel.

[DEFENSE COUNSEL]: Well, your Honor, I'll tell you, you run into cases like this where your client, for example, cannot help you, and this is one of those cases. The thing I saw in there was this statement they didn't introduce that Mr. Harden made a statement indicating that the man assaulted him sexually and then he hit him and didn't know what went on. But Mr. Harden can't even tell me that.

THE COURT: All right, well, that's a separate issue.

I think I know what you're doing and I don't think you would have irresponsibly neglected to pursue that defense, or whatever, by seeking an independent examination, is that correct?

[DEFENSE COUNSEL]: That's correct.

THE COURT: So as a matter of trial tactic you decided to pursue it in the manner that you have during this trial here.

[DEFENSE COUNSEL]: And I felt that the jury would then be able to deal with it and –

THE COURT: All right, I can understand that as a matter of trial tactic in the manner that you have done it so far.

The court later emphasized, "There is no insanity defense in this case."

The defense presented the testimony of two lay witnesses: one who had seen defendant in church the day before the killing, and defendant's mother. The churchgoer testified that defendant seemed "out of it," that he had paced the hallway of the church and said someone was going to kill him. It was the first time she had seen defendant in approximately ten years. His mother testified that, after being notified that her son was acting strangely, she went to the church to pick up defendant, and then drove him to the hospital because he was saying that someone "had a contract out on him." Once at the hospital, defendant asked his mother to pick up his tennis shoes for him and she left. When others returned with the shoes, they learned that defendant had "run away" from the hospital. The next day, defendant's mother called the Pontiac police to notify them that her son was missing and that he was mentally ill. On Friday, the Detroit police notified defendant's mother of the arrest.

Defendant testified that he knew he was on trial for the killing. He then testified that the scene did not look familiar, that he did not know he had been in the hospital, that he did not interview with Dr. Aytch, that he did not recall the circumstances of his arrest, and that he did not recall signing his statement to police[4] On cross-examination, defendant could not recall any details of his military service.

[4] Defendant testified that, although it looked like his signature on the statement, that the words used were not words that he would have chosen, that the statement was not made in a way that he would talk.

In closing arguments, defense counsel admitted defendant's guilt: "Nor are we debating the fact that under the evidence, the circumstantial evidence that has been proved, that Mr. Harden was the one that was responsible for [the victim's] death." Counsel relied on the testimony of the churchgoer, who worked at a mental hospital,[5] as evidence of defendant's mental illness. Counsel also attempted to discredit Dr. Aytch's testimony and argued, "[A]s we look at the totality of the circumstances, we will find that something was wrong mentally. The man was not acting right. He certainly was not acting with any wilful intent to do murder. He didn't go and assault anybody." Counsel further argued: "The law doesn't substitute an expert's opinion for your opinion. You've heard the facts. You've heard what went on. It doesn't sound like it's normal." Counsel also stated, without objection, that "the People have the burden of showing that this man was of sound mind."

The court read defendant's theory of the case to the jury:

> "This case does not involve winning or losing. It is a search for truth and justice. In this case there have been mountains of evidence produced before you to demonstrate Mr. Harden's state of mind at the time of the commission of the offense.
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> While the law of this state provides that insanity is an affirmative defense, and that the defendant has the burden of proving the defense of insanity by a preponderance of the evidence, that burden can be carried by the defendant by the cross-examination of all of the witnesses in the case.
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> And when considering all of the evidence adduced in this case, whether by cross-examination of the People's witnesses or by any other evidence produced by the defendant, you believe that defendant was suffering from mental illness at the time of the crime and was unable to either appreciate the nature and quality of [sic] the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of law, then you must find that the defendant was legally insane when he committed the offense involved in accordance with the statutory laws of this state."

The court instructed the jury on the defense of legal insanity and on the verdict of guilty but mentally ill. It appears from the record that the jury deliberated for approximately 1½ hours before returning its guilty verdict.[6]

Defendant moved to adjourn sentencing to allow an independent psychological examination. The court granted the motion and defendant was evaluated by Robert Cornette, a licensed psychologist. Dr. Cornette examined defendant on February 12, 1996. Dr. Cornette's written report expresses the opinion that defendant suffered from dementia. Acknowledging that his findings were at odds with those of Dr. Aytch, he concluded that defendant was unable to comprehend or control his behavior, to

[5] The record does not reveal in what capacity the witness was employed.

[6] The jury verdict form included the following options: "not guilty," "guilty of murder second degree," "not guilty by reason of insanity," or "guilty of murder second degree but mentally ill."

comprehend his present circumstances, or to cooperate with his attorneys, and that he was incompetent to stand trial.[7]

During the course of the proceedings, defendant received a total of three referrals to the Center for Forensic Psychiatry. The third examination was made on or about September 6, 1996, pursuant to the trial court's order. As part of the examiner's review, he consulted the police investigation report that indicated that, three days after the killing, defendant provided an account of the offense and described assaulting the victim for the purpose of self-defense. The following day, however, he reported having no memory of the events. The examiner also noted that another evaluator had concluded that defendant was "intentionally feigning amnesia." During the examination, defendant reported suffering from hallucinations every other day or so since sometime around the seventh grade. The examiner noted that "the putative nature of the defendant's self-reported psychosis is entirely inconsistent with the psychotic symptoms which are associated with known Psychotic Disorders."

The examiner concluded that, despite his claims to the contrary, defendant was not psychotic. However, the examiner noted that defendant "may have suffered from persecutory delusions in the past" and that it was possible that "he suffers from some kind of chronic or recurrent Mental Disorder with which his psychosis was associated," but that more information was needed to reach a firm conclusion. He noted that defendant himself acknowledged that he was malingering cognitive deficits, which would indicate that previous tests were invalid. In the examiner's opinion, defendant did not suffer from Dementia or any other Cognitive Disorder, and it did not appear that he suffered from "organic damage or injury sufficient to cause the defendant's seemingly uncontrolled and bizarre behavior."

Appellate counsel filed a post-conviction motion seeking payment of expert witness fees to allow defendant to undergo an independent psychiatric examination to determine whether he was legally insane for the purpose of seeking a new trial. Counsel argued that defendant's insanity was "newly discovered evidence" and that trial counsel's admitted "trial tactic" of not obtaining an independent psychiatric examination and of not providing expert testimony during trial required a *Ginther*[8] hearing to determine whether such tactic constituted ineffective assistance of counsel.

Pursuant to the trial court's order, appellate counsel had defendant's case reviewed by Alisia Benedict, a forensic psychiatrist. After reviewing Dr. Benedict's opinion, counsel withdrew her motion for new trial and a *Ginther* hearing, stating, "I am no longer able to go forward with the motion based on her opinion." On appeal, defendant does not challenge the sufficiency of his trial counsel's representation.

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[7] Apparently, Dr. Cornette and Dr. Aytch testified before the court on April 23, 1996, but this Court has not been provided with a copy of the transcript of those proceedings. As a result of that hearing, defendant was ordered to undergo a CAT scan to determine whether he suffered from an organic disorder. Sentencing was adjourned for several months pending the submission of medical reports.

[8] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Since his incarceration, defendant has displayed bizarre behavior and has been closely observed by prison psychiatrists and psychologists. The provisional diagnoses have varied. However, one observer opined as follows: "Malingering for secondary gain. Likely to gain unfavorable [psychiatric evaluation] to assist in appeal of his case. Very antisocial/impulsive. No evidence of psychosis/thought disorder." The very next day, defendant was observed naked in his cell and appeared to be responding to hallucinations, which he denied experiencing on other occasions. Corrections officers claimed that defendant "only exhibits unusual behavior when he knows someone is watching."

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Counsel's failure to raise a defense constitutes ineffective assistance if the defendant shows that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy and ineffective assistance of counsel will not be found merely because a strategy backfires. *People v Duff*, 165 Mich App 530,545-546; 419 NW2d 600 (1987).

Defendant has not argued ineffective assistance of counsel on appeal. Nevertheless, our review of the lower court file, including appellate counsel's withdrawal of the post-conviction motion for new trial and for a *Ginther* hearing, does not support a finding that trial counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

There was evidence that defendant was a malingerer. Trial counsel, who understood the credibility and demeanor of witnesses and his client, chose not to present expert testimony concerning the insanity defense. Under the circumstances, this trial tactic did not fall below an objective standard of reasonableness. Moreover, a necessary component of the insanity defense is that the defendant be mentally ill. The jury had the option of finding defendant guilty but mentally ill, and the jury rejected that option.

This is not a case where defense counsel completely failed to present a statutorily available defense. See *Vasquez v State*, 830 SW2d 948 (Tex Crim App 1992). Here, defense counsel employed the trial strategy of presenting the defense solely by way of lay testimony and cross-examination of prosecution witnesses. This Court has held that the testimony of lay witnesses may be competent evidence on a defendant's mental illness, and a trier of fact is not bound to accept the opinion of an expert. *People v Clark*, 172 Mich App 1, 8; 432 NW2d 173 (1988). "While the record reveals that defense counsel may have more strongly presented the insanity defense, the record just as clearly reveals that the jury's decision to convict was based on the evidence -- not counsel's performance." *Pickens, supra* at 328.

The evidence, viewed in a light most favorable to the prosecution, was sufficient to the extent that a rational trier of fact could find that the essential elements, including malice, of the second-degree murder charge were proved beyond a reasonable doubt.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Jeffrey G. Collins