

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIM ANTHONY TERRELL,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

No. 219000
Calhoun Circuit Court
LC No. 98-003589-FC

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

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, malicious destruction of property over \$100, MCL 750.377a; MSA 28.609(1), operating a vehicle while impaired, MCL 257.625(3); MSA 9.2325(3), and operating a vehicle with expired license plates, MCL 257.255(1); MSA 9.1955(1).¹ After a trial by jury, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and operating a vehicle while impaired, MCL 257.625(3); MSA 9.2325(3). Defendant was sentenced to five to ten years' imprisonment for the assault conviction and ninety days' incarceration for the operating a vehicle while impaired conviction. Defendant appeals as of right. We affirm.

Defendant and Vicky Blanchard-Terrell, his estranged wife, got into an argument at a local tavern. Blanchard-Terrell left the tavern, with defendant following, and the argument continued in the parking lot. Blanchard-Terrell refused defendant's offer for a ride, and began walking home. Defendant drove his truck to Blanchard-Terrell's residence and rear-ended a vehicle parked in the driveway, pushing it through the garage.

Defendant then returned to where Blanchard-Terrell was walking and told her to get in the truck. When Blanchard-Terrell refused, defendant turned the truck around, drove to where Blanchard-Terrell was walking, hit her with the truck, and dragged her approximately ten feet until he ran into a station wagon. A bystander pulled Blanchard-Terrell out from under the truck

¹ Plaintiff dismissed the counts of malicious destruction of property and operating a vehicle with expired license plates before trial.

before defendant fled the scene. Defendant eventually ran the truck into a telephone pole and brick utility building down the street. At trial, defendant did not dispute that the incident occurred, arguing instead that it was a drunk driving accident.

The first issue presented for review is whether defendant's trial counsel was ineffective because he failed to request the jury instruction CJI2d 7.3a, and failed to present the defense of diminished capacity. Allegations of ineffective assistance of counsel should be heard by the trial court to establish a record of the facts pertaining to the allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where no *Ginther* hearing was held, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel justifying reversal, a defendant must show that defense counsel's representation fell below an objective standard of reasonableness and the representation was so prejudicial that the defendant was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Defendant must also overcome the strong presumption that the challenged action or omission was sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). This Court will not second-guess counsel's trial tactics, nor will it assess counsel's competence with benefit of hindsight. *People v Emerson (On Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

This Court agrees with defendant's contention that his trial counsel's representation was not objectively reasonable because he did not request CJI2d 7.3a, the accident as defense to specific intent crime jury instruction². Defendant is entitled to have instructions given if they are at all supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995). Defendant testified that he did not intend to hit his wife with his truck and claimed he lost control of his truck. In addition, defendant's trial counsel emphasized repeatedly during closing argument that this was a "drunk driving accident." Yet, defendant's trial counsel did not request the jury instruction. We find that this omission was objectively unreasonable because it deprived the jury of an instruction on defendant's theory of the case.

Although defense counsel's performance was deficient, defendant's claim of ineffective assistance of counsel fails because he cannot demonstrate that he was prejudiced by the lack of

² CJI2d 7.3a states:

The defendant says that he is not guilty of [*state crime*] because he did not intend to [*state specific intent required*]. The defendant says that his conduct was accidental. If the defendant did not intend to [*state specific intent required*], he is not guilty. The prosecutor must prove beyond a reasonable doubt that the defendant intended to [*state specific intent required*].

the accident instruction. Contrary to defendant's theory of a drunk-driving accident, the testimony presented at trial supported a finding that he intentionally struck his wife with his truck. Defendant drove at a high rate of speed to Blanchard-Terrell's home and rear-ended a vehicle, pushing it through the garage. Blanchard-Terrell testified that she heard squealing of tires and turned around to see defendant's truck coming at her at 15 to 20 mph. Blanchard-Terrell explained how the truck's engine continued to whine as she was dragged underneath it. A witness stated that defendant waited until Blanchard-Terrell walked in front of the truck, revved up the engine, and drove forward hitting her as she turned around. Given the overwhelming evidence of intentional conduct, defendant's accident theory was not a viable defense. We conclude that defendant did not demonstrate that it was probable that the outcome of the trial would have been different had the jury instruction been given.

Defendant also contends that his trial counsel was ineffective because he failed to raise a diminished capacity defense. We disagree. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present the defense and the defense of which he was deprived was substantial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

In order to assert diminished capacity, defendant must give pretrial notice of his intention to raise the defense. *People v Denton*, 138 Mich App 568, 570; 360 NW2d 245 (1984). A claim of diminished capacity does not require a showing that a defendant is legally insane, but that he lacked the mental capacity to entertain the specific intent necessary for conviction of a particular crime. *Id.* at 570-571. The circumstances of this case clearly demonstrate that defendant did not lack the mental capacity to entertain the specific intent necessary to prove the crime charged. Trial counsel is not required to argue a meritless defense. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). We conclude that defendant was not deprived of a substantial defense and his allegation of ineffective assistance of counsel fails.

The second issue raised by defendant is whether the trial court should have sua sponte given CJI2d 7.3a to the jury. A trial court is required to instruct the jury concerning the law applicable to the case and to present the case fully and fairly to the jury in an understandable manner. *Henry, supra* at 151. However, in accordance with MCL 768.29; MSA 28.1052:

The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. *The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.* [Emphasis added.]

We find no error in this case because defendant did not request the instruction.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Joel P. Hoekstra

/s/ Jane E. Markey