

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNELL V. HAYWOOD,

Defendant-Appellant.

UNPUBLISHED

January 16, 2001

No. 214690

Wayne Circuit Court

LC No. 97-500792

Before: Neff, P.J., and Talbot and J.B. Sullivan,* J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison for the first-degree murder conviction and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arose from the shooting death of Robert Hill, whom defendant followed into a store, fought with and then shot seven times, the last shots as Hill's body lay on the floor. Defendant first claims that the trial court erred in failing to sua sponte instruct the jury on involuntary manslaughter. We disagree. This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence. *Id.* Involuntary manslaughter is defined as 1) the killing of another without malice and unintentionally, 2) in doing some unlawful act not amounting to a felony nor naturally intending to cause death or great bodily harm, or 3) in negligently doing some act lawful in itself, or 4) by the negligent omission to perform a legal duty. *People v Clark*, 453 Mich 572, 578; 556 NW2d 820 (1996). The kind of negligence required for manslaughter is more than simple or ordinary negligence, and is often described as criminal negligence, gross negligence or willful wantonness and recklessness. *Id.*

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In this case, defendant neither requested an involuntary manslaughter instruction, nor objected to the jury instructions as given. The issue is therefore not preserved for appeal. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Further, the evidence does not support a conviction of involuntary manslaughter. See *People v Bailey*, 451 Mich 657, 671; 549 NW2d 325, amended 453 Mich 1204; 551 NW2d 163 (1996). In any event, involuntary manslaughter is a cognate lesser included offense of murder, *id.*, at 672-673, and refusal by the court to give the instruction is subject to a harmless error analysis. *People v Mosko*, 441 Mich 496, 501-502; 495 NW2d 534 (1992); *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). Here, the jury rejected lesser charges of second-degree murder and voluntary manslaughter, rendering any error harmless.

Defendant next argues that the trial court erred in failing to grant his attorney's motion to withdraw prior to sentencing. We again disagree. This Court reviews for an abuse of discretion a trial court's denial of counsel's motion to withdraw and defendant's motion for adjournment to obtain new counsel. *People v Echavarria*, 233 Mich App 356, 368-369; 592 NW2d 737 (1999). The factors to be considered are: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *Id.*, at 369. Here, while defendant is asserting his constitutional right to counsel, the only reason offered was that he was not comfortable with his attorney. Moreover, defendant was convicted on April 30, 1998, but negligently waited until July 17, 1998, the day of sentencing, to request substitute counsel. Finally, defendant cannot establish prejudice because, in accordance with MCL 769.1(1); MSA 28.1072 (1), defendant was sentenced as an adult, and the statutorily mandated sentences for first-degree murder and felony-firearm preclude the use of discretion by the sentencing court.

Defendant's next two claims of error concern the sentencing dispositional hearing on an unrelated case, and therefore are not properly before this Court.

Finally, in a supplemental brief in propria persona, defendant claims that he was denied the effective assistance of counsel because counsel did not call him to testify; advanced a theory of misidentification when the evidence, that the shooting was accidental or provoked, supported a finding of manslaughter; failed to call an expert witness; and ineffectively cross-examined the prosecution's medical witness. Because defendant failed to preserve this issue by an evidentiary hearing or a motion for new trial, this Court's review of defendant's claim is limited to errors apparent from the record. *Snider, supra*, at 423. To establish a claim of ineffective assistance of counsel, the defendant must show that 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 Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy, and bears the burden of proving otherwise as measured by an objective standard of reasonableness. *Id.*

We note initially that defendant agreed on the record with counsel's recommendation that he not testify, stating to the court, "I don't want to take the stand." Additionally, he fails to

indicate either the substance of his testimony or how it would have affected the outcome of the case. In any event, all of defendant's claims of ineffective assistance of counsel are matters of trial strategy which this Court will not assess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Finally, considering the overwhelming evidence of defendant's guilt, we conclude that counsel's representation was neither deficient nor prejudicial. *Toma, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan