

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOHN PAUL BAUGH,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 233166

St. Clair Circuit Court

LC No. 00-000242-FC

Before: Meter, P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

Defendant appeals his jury conviction of second degree murder, MCL 750.317.¹ The jury found defendant guilty but mentally ill and the trial court sentenced defendant as a first habitual offender, MCL 769.10, to 32 to 60 years' imprisonment. We affirm.

Defendant contends that, during jury deliberations, the trial court improperly refused the jury's request to review the defense psychologist's testimony. Because defendant did not object to the court's handling of the request at trial, we review this forfeited issue for plain error and whether the alleged error affected defendant's substantial rights. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999).

MCR 6.414(H) governs this issue and says:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse an unreasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed. [MCR 6.414(H).]

¹ Defendant appeals as of right.

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

The record shows that the trial court complied with this rule by explaining that the requested testimony would not be available the same day because it had not yet been transcribed, and the judge did not foreclose the possibility of having all or part of the testimony available at a later time. The jury very likely understood this to be a provisional ruling because the court handled an earlier request for defendant's testimony by advising the jury that it had yet to be transcribed and then, ultimately, provided the testimony to the jury. Because the court's handling of this request was not plain error, reversal is not warranted.

Also, defendant asserts that counsel's failure to call a particular witness who would have testified that the victim had threatened to cut defendant's throat amounted to ineffective assistance of counsel. We review this constitutional issue de novo. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). Because defendant's motion for a hearing on this issue was denied, our review is limited to the existing record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

To establish ineffective assistance of counsel, defendant must show that counsel's performance at trial fell below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the verdict would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Toma, supra* at 302. Also, defendant must show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002). Defendant must overcome the presumption that counsel's failure to call the witness might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

Here, we are not persuaded that counsel's failure to call this witness, whose testimony would have been relevant to a self-defense argument, constituted an objectively unreasonable performance, particularly where the focus of the defense was on defendant's insanity plea. Furthermore, other evidence was presented to support defendant's self-defense claim, such as his knowledge that the victim carried a knife. *People v Harris*, 458 Mich 310, 316; 583 NW2d 680 (1998). Importantly, because both defendant and his mother testified that the victim had threatened defendant's life, it is highly unlikely that the absence of this witness' cumulative testimony affected the outcome of the trial. Therefore, reversal is unwarranted.

Defendant also asks us to reconsider the constitutionality of the statute which permits the jury to return a verdict of guilty but mentally ill, MCL 768.36(1). We cannot do so because our Supreme Court rejected the identical argument in *People v Ramsey*, 422 Mich 500, 509-516; 375 NW2d 297 (1985), and, quite clearly, we are bound to follow this decision, MCR 7.215(I)(1); *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns