

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENIA FULLER,

Defendant-Appellant.

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UNPUBLISHED  
February 12, 2004

No. 244906  
Wayne Circuit Court  
LC No. 01-008902

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the shooting death of Sherenna Shaw. We affirm.

Defendant claims multiple errors in the jury instructions given by the trial court. Defendant waived this issue by expressly approving the instructions. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). As such, we find that any error is extinguished and we will not review the claimed instructional errors. See *id.*

Defendant also claims on appeal that she was deprived the effective assistance of counsel because her trial counsel failed to object to the erroneous jury instructions and allowed the issue to be waived. We disagree. As defendant failed to move for a new trial or *Ginther*<sup>1</sup> hearing, our review is limited to the existing record. See *People v Sabin (On Second Rem)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant has the burden to show a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

unreliable. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first contends that trial counsel was ineffective for not objecting when the trial court failed to instruct the jury on what a “justifiable” or “excusable” killing was or what “circumstances” would reduce a killing to a lesser crime as these terms are used in the instructions related to second-degree murder and involuntary manslaughter. However, the trial court’s instructions were consistent with the standard jury instructions<sup>2</sup> and the evidence presented at trial did not support a theory that the killing was justifiable or excusable. See *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Therefore, as defense counsel is not required to raise meritless or futile objections, we conclude that defendant has failed to show that trial counsel was deficient for not objecting to the jury instructions on this ground. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant’s next contention is that trial counsel was ineffective for not objecting when the trial court failed to instruct the jury that each element of the charge of felony-firearm must be proven beyond a reasonable doubt. This claim is without merit because the trial court did render this instruction and, thus, no objection was proper.

Defendant’s third and fourth claims of ineffective assistance involve CJI2d 3.11. The third claim is that defense counsel should have objected when the trial court interfered with the jury’s power of leniency by instructing the jury that they must first consider the charge of first-degree murder and could not consider the lesser included offenses if they agreed to defendant’s guilt on that charge. The fourth contention is that defense counsel should have objected when the trial court failed to explicitly instruct the jury that it could render no verdict if a unanimous agreement could not be reached on guilt or innocence. However, the trial court’s instruction was substantially similar to the standard jury instruction as written and, therefore, was properly given. See *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995). We conclude that any objection to these instructions would have been without merit and defense counsel was not constitutionally ineffective for failing to raise such objection.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Hilda R. Gage  
/s/ Brian K. Zahra

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<sup>2</sup> See CJI2d 16.1; CJI2d 16.5; CJI2d 16.10.