

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN ROBERT BLOYE,

Defendant-Appellant.

UNPUBLISHED
December 9, 2004

No. 249624
Marquette Circuit Court
LC No. 02-039831-FH

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession of a weapon by a prison inmate, MCL 800.283(4), entered after a jury trial. He was sentenced as a fourth habitual offender to four to fifteen years in prison, to be served consecutively to the sentence he was serving when the offense was committed. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with possession of a weapon by a prison inmate after a corrections officer found a spear-like weapon in his cell. A forensic examiner evaluated defendant, and found him competent to stand trial and criminally responsible. Subsequently, the trial court allowed counsel to withdraw from the case, but ordered counsel to remain available to assist defendant if he so requested.

Defendant filed a motion seeking to be allowed to present the defense that, by virtue of diminished capacity that did not rise to the level of legal insanity, he was unable to form the intent necessary to have committed the charged offense.¹ The trial court denied the motion, opining that diminished capacity was not a viable defense, and noting that defendant had not adhered to the procedural requirements for asserting the insanity defense.

At trial, defendant acknowledged that he kept a weapon in his cell, but maintained that prison employees were poisoning him, and asserted that he insisted on a trial in order to publicize the situation at the prison. The warden's administrative assistant testified that

¹ Possession of a weapon by a prison inmate is a specific intent crime. CJI2d 3.9.

defendant had filed numerous grievances regarding the alleged actions of the prison employees, and that the grievances had been investigated and proven to be unsubstantiated.

Defendant argues that he was deprived of the due process by: (1) the trial court's erroneous pre-trial ruling precluding him from presenting the defense of insanity; (2) the prosecutor's improper argument that the issue of mental illness or insanity was not before the jury; and (3) the trial court's erroneous instruction that neither insanity nor mental illness had been raised as a defense. Furthermore, defendant argues that trial counsel rendered ineffective assistance by failing to investigate and present the defense of legal insanity.

Legal insanity is a defense to a charged crime. A person is legally insane if, as a result of mental illness, he lacked the substantial capacity to appreciate the nature and quality or the wrongfulness of his conduct, or to conform his conduct to the requirements of the law. Mental illness, in and of itself, does not constitute the defense of legal insanity. A defendant has the burden of proving the defense of insanity by a preponderance of the evidence. MCL 768.21a; *People v Stephan*, 241 Mich App 482, 489; 616 NW2d 188 (2000). A defendant who seeks to assert the defense of insanity must serve written notice on the court and the prosecutor not less than thirty days before trial, and submit to an examination by personnel at a center for forensic psychiatry or other qualified personnel. MCL 768.20a(1)-(3).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

We affirm. Defendant, acting *in propria persona*, filed a motion seeking to be allowed to present the defense of diminished capacity to negate specific intent. In the motion, defendant indicated that the defense of diminished capacity did not rise to the level of legal insanity. Evidence of mental incapacity less than insanity cannot avoid or reduce criminal responsibility by negating specific intent. Only mental illness constituting insanity can negate intent. The defense of diminished capacity is not available. *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001). The trial court correctly held that the defense of diminished capacity was not viable. Moreover, the trial court correctly held that defendant's failure to properly present an insanity defense, i.e., to file a notice of intent to present such a defense, precluded him from raising the defense at trial. MCL 768.20a(1). The procedural limitations placed on the ability to raise an insanity defense do not unconstitutionally infringe on a defendant's due process right to present a defense. *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000).

Defendant's assertion that he was denied due process by the prosecutor's argument and the trial court's instruction to the jury that the issue of mental illness or insanity was not before it is without merit. The defense of diminished capacity was not available, *Carpenter, supra*, and defendant failed to file a notice of intent to assert an insanity defense, as required by MCL 768.20a(1). The statements made by the prosecutor and the trial court were correct. Moreover, by stating that he had no objection to the instructions as read by the trial court, defendant waived any claim of error on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Counsel did not render ineffective assistance by failing to investigate and properly raise and present the defense of insanity. Prior to conducting a preliminary examination, the district court ordered that defendant be evaluated for competency and criminal responsibility. The examiner opined that defendant was competent to stand trial and criminally responsible, and that his mental status did not meet the requirements for legal insanity. In reaching his conclusion the examiner not only spoke with defendant, but also reviewed records of prior forensic evaluations, none of which found that defendant was legally insane. It is likely that counsel's decision to refrain from filing a notice of intent to present an insanity defense was a matter of trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, after defendant assumed primary responsibility for his own defense, he did not request that counsel assist him in filing a notice of intent to assert an insanity defense. Defendant has not established prejudice in that he has not shown that but for an error by counsel, it is reasonably probable that the result of the proceedings would have been different. *Carbin, supra*.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens