

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN LEE HENTZ,

Defendant-Appellant.

UNPUBLISHED

December 30, 2008

No. 281568

Mecosta Circuit Court

LC No. 06-005813-FH

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of possession of 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227(b); and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to serve concurrent terms of five to 20 years for possession with intent to deliver cocaine and 11 months for possession of marijuana, and to a consecutive two-year term for felony-firearm. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that he was denied the effective assistance of counsel because counsel failed to object with specificity to the admission of two particular exhibits. We disagree.

The questioned exhibits were transcripts from two separate family court proceedings involving the termination of parental rights. One proceeding involved the parental rights of defendant and a witness at trial, while the other proceeding involved the witness but not defendant. Both proceedings resulted in the termination of parental rights. None of the parents appeared at the proceedings, even though they had been served with notice.

The prosecution offered the exhibits to show flight, arguing that the reason the witness and defendant did not appear to protect their parental rights was that they were in hiding and had fled the state to avoid arrest. The context of the record indicates that the prosecutor moved to admit the exhibits during an off-the-record conference with the trial court. When the trial court went back on the record, defense counsel immediately asked the court to give a legal basis for admitting the exhibits into evidence. After the trial court listed several reasons for the admission, defense counsel asked for a standing objection. The trial court noted defense counsel's objection, and admitted the exhibits into evidence.

Defendant relies on *People v Aldrich*, 246 Mich App 101; 631 NW2d 67 (2001), to argue that it is necessarily ineffective assistance of counsel to make only a general, standing objection rather than a specific objection.¹ We disagree.

To demonstrate ineffective assistance of counsel, a defendant must show that defense counsel's performance at trial "fell below an objective standard of reasonableness," and that the error was so prejudicial that it effectively denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that defense counsel's conduct was based on sound trial strategy, *id.*, and must also show that, but for defense counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Id.* at 302-303.

Defendant's reliance on *Aldrich* for his claim of ineffective assistance of counsel is misplaced. A close reading of *Aldrich* reveals that this Court relied on MRE 103(a)(1) when discussing specific objections. *Aldrich*, *supra* at 113. MRE 103 states in pertinent part:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

When MRE 103 is read in conjunction with *Aldrich*, it becomes apparent that there are two ways in which counsel can preserve an evidentiary issue for appeal. First, counsel can make "a timely objection or motion to strike" on the record, "stating the specific ground of objection[.]" MRE 103. The second way is where a timely objection is made off the record, but "the specific ground" for the objection is "apparent from the context" of the record. *Id.* Here, defense counsel's objection falls within the latter category.

The trial court listed several grounds for the admission of the questioned exhibits. Those reasons put defense counsel's off-record objections into context. For example, the fact that the trial court cited the hearsay exception found in MRE 803(23) as authority for admitting the exhibits leads to the conclusion that defense counsel must have made a specific off-record objection to the exhibits as being inadmissible hearsay. This means that under MRE 103(a)(1), defense counsel properly preserved the issue of whether Exhibits 68 and 69 were inadmissible hearsay because "the specific ground" for the objection is "apparent from the context" of the record. MRE 103.

Since defense counsel properly preserved the issue of the admissibility of the exhibits, defendant's argument that defense counsel was ineffective must fail. Defendant has not met the burden of showing that defense counsel's actions were objectively unreasonable and amounted to

¹ *Aldrich*, *supra* at 113 ("To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal.").

unsound trial strategy. See *Toma, supra* at 302-303 (To prevail on a claim of ineffective assistance of counsel, defendant must show that defense counsel's performance at trial "fell below an objective standard of reasonableness" and must also overcome the strong presumption that defense counsel's conduct was based on sound trial strategy.). Moreover, because defendant has failed to show that defense counsel's performance was deficient, this Court need not address the issue of whether defense counsel's errors were prejudicial. See *Strickland v Washington*, 466 US 668, 694-695; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Patrick M. Meter