

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERONICA LEE MILLER,

Defendant-Appellant.

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UNPUBLISHED

March 26, 2009

No. 281874

St. Clair Circuit Court

LC No. 07-000821-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for delivery of a controlled substance causing death, MCL 750.317a. We affirm.

Defendant's conviction arose out of the death of Kimberly Larvins from a heroin overdose. Defendant admitted that she procured heroin and made it available to Larvins in defendant's residence. Larvins injected the heroin while in the residence and collapsed. She died approximately a week later.

Defendant challenges the effectiveness of her trial counsel's assistance. Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. This constitutional right includes the requirement that counsel present a reasonable defense. *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994). A Michigan defendant seeking relief from a judgment on the ground that counsel was ineffective must demonstrate that "counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive [her] of a fair trial." *Id.* at 338. In the absence of a *Ginther*<sup>1</sup> hearing, our review of defendant's claims is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant first argues that her counsel was ineffective for failing to object to two statements made by the prosecutor that the charged crime was not a "homicide." We agree with defendant that the offense of delivery of controlled substances causing death is a "homicide."

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

The offense is contained within Chapter XLV of the Michigan Penal Code, which is entitled “Homicide,” see MCL 750.317a, and is within both the lay and legal definitions of homicide. *Random House Webster’s College Dictionary* (1991); *Black’s Law Dictionary* (8th ed). However, defendant cannot show that counsel’s failure to object to the comments affected the outcome of her trial.

A prosecutor’s clear misstatement of the law can deprive a defendant of a fair trial if the misstatement “undermined a viable defense theory.” *People v Matulonis*, 115 Mich App 263, 267-268; 320 NW2d 238 (1982). Here, the trial court properly instructed the jury on the elements of the charged crime and the lesser included offense of delivery of a controlled substance and there is no indication that the prosecutor’s misstatements undermined a defense theory. Defendant’s theory was to acknowledge delivery of the heroin, but to request that the jury convict, if at all, on the lesser included offense. Defense counsel could reasonably have determined that objecting to the prosecutor’s reference to homicide would only remind jurors that they need not find that defendant intended to kill Larvins to convict her of the charged crime. Counsel instead may reasonably have been seeking to focus the jurors on the lesser included offense of delivery. Accordingly, the lack of objection to the prosecutor’s misstatements could be deemed a reasonable trial strategy. Moreover, the prosecutor’s second reference to homicide could also be deemed a reasonable response to defendant’s closing argument, which focused on the medical examiner’s testimony about his decision to categorize the manner of Larvins’ death as an “accident” rather than as a “homicide.” *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003); *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989).

Even were we to find that defense counsel should have objected to the prosecutor’s arguments, we could not find that the outcome of the trial would have been different but for the lack of objection. First, the trial court instructed the jury both that the lawyers’ statements and arguments were not evidence and that the jury was to take the law as given to it by the court and not as indicated by counsel. This Court presumes that jurors follow the trial court’s instructions. *People v Knapp*, 244 Mich App 361, 382-383; 624 NW2d 227 (2001). Second, the trial court properly instructed the jury as to the elements of the charged offense and defendant’s own testimony was sufficient to establish each of those elements.

Defendant also argues that her trial counsel should have requested an instruction on involuntary manslaughter and she seeks a remand for a *Ginther* hearing to address this claim. However, there was no ground for the trial court to instruct the jury on involuntary manslaughter. The elements of delivery causing death differ from the elements of involuntary manslaughter. With regard to the case at bar, delivery causing death requires proof that the defendant delivered a controlled substance, which is a felony, while involuntary manslaughter requires proof of an unlawful act *not* amounting to a felony. See *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003). Accordingly, defendant was not entitled to an instruction on involuntary manslaughter, and defense counsel cannot be deemed ineffective for failing to request such an instruction. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). No error having occurred, we deny defendant’s motion to remand for an evidentiary hearing.

We affirm.

/s/ Henry William Saad

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra