STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2009
v	No. 284272 Genesee Circuit Court
RANDY WAYNE SNYDER, Defendant-Appellant.	LC No. 07-020464-FC

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and sentenced as a fourth habitual offender, MCL 769.12, to 25 to 50 years' imprisonment. He appeals as of right. We affirm.

I. Relevant Facts and Procedural History

Defendant's conviction arises from the October 1996 drowning death of William Beauchamp in Genesee County. Defendant was tried jointly with codefendant Danny Thompson, who was convicted by a separate jury of first-degree premeditated murder, MCL 750.316(1)(a).

Testimony at trial indicated that Beauchamp visited the Viking Lounge bar in Flint on October 6, 1996. According to the bartender, Julie Vega, Beauchamp was a frequent customer who appeared to be homeless and mentally unstable. Vega testified that defendant and Thompson came into the bar and sat beside Beauchamp. Thompson told Vega that he intended to "take [Beauchamp] out" because Beauchamp had previously robbed Thompson's grandmother. Beauchamp later left the bar with defendant and Thompson, despite Vega's warning not to go with them.

Beauchamp's body was discovered the next morning in the Flint River near a fishing site. A forensic examination revealed that he had been struck on the head with a blunt object and there were markings on his body that were consistent with having been dragged across the ground. The examination also revealed that he was still alive when he entered the water. The examiner determined that the cause of death was drowning, and that the manner of death was homicide.

Lieutenant Kevin Shanlian of the Genesee County Sheriff's Department investigated Beauchamp's death after receiving information from Vega. Shanlian interviewed Thompson, who stated that he had left the Viking Lounge with his wife and that Beauchamp left with another man. The investigation was eventually discontinued until additional information was received in 2006.

Robert Thompson (no relation to codefendant Danny Thompson) testified that he was incarcerated in 2006 and met defendant, who was serving a prison sentence for an unrelated offense. Although defendant had been convicted of second-degree criminal sexual conduct for sexually assaulting his nine-year-old niece, that information was not disclosed to the jury. According to Robert, defendant approached him and inquired whether he could receive a "time cut" on his sentence in exchange for coming forward with information about an unsolved crime. Defendant told Robert that he and codefendant Thompson left a bar with a man against whom Thompson held a grudge, and the three of them drove in defendant's truck to a nearby pond. According to Robert, defendant stated that Thompson hit the man on the head with a 40-ounce bottle and asked defendant for a tire iron, but defendant falsely told Thompson that he did not have a tire iron. Thompson then dragged the man's body to the pond. Defendant told Robert that he wanted to come forward because Beauchamp's death "was bothering him a lot." Defendant subsequently admitted to Robert that he helped drag Beauchamp's body to the water, but only because he was afraid of Thompson.

Before trial, defendant and Thompson both sought to exclude evidence of their prior criminal history. Thompson moved to exclude evidence of his prior imprisonment and involvement in a prison gang, but did not object to references to his pretrial incarceration in the Genesee County Jail. Defendant moved to exclude evidence of his prior convictions, but did not object to evidence that he had previously been in prison. The trial court granted both motions.

At trial, the prosecution called James Newell, who knew both Thompson and defendant when all three men were incarcerated in St. Louis, Michigan, in 1995. Newell stated that he subsequently encountered Thompson in the Genesee County Jail, where Thompson was incarcerated while awaiting trial in this case. Before Newell testified, defense counsel made the following statement on the record:

> [Newell] will, I understand, give testimony that will impact the defenses of both of the defendants and he will give testimony about statements made by Mr. Thompson I understand that Mr. Snyder may have been present for. Technically, he maybe shouldn't be testifying in front of Mr. Snyder's jury because of the Bruton rule. However, because of our strategy in the case and the fact that we don't mind if the jury knows that Mr. Snyder was incarcerated and was in a gang and those sorts of things, I just want to put on the record, as a matter of strategy, we don't need to have Mr. Snyder's jury excused for any of the testimony.

Newell testified that he overheard a conversation between Thompson and defendant in 1995. He heard Thompson say to defendant that "a guy needed to die" because he had done something wrong to Thompson's mother. Newell testified that Thompson's exact words were, "The bitch needs to die." Newell also testified that Thompson told him the history of his

involvement in Beauchamp's death while they were both incarcerated in the county jail. Thompson told him that he and defendant left the bar with Beauchamp. Newell further stated:

> [After leaving the bar] [t]hey ended up out to his old fishing spot and he said a little quarrel broke out. Danny told me a little quarrel broke out between him and the guy that got killed and he said that guy had hit him in the mouth, and then he had Randy hit that guy with a blunt object and they took him and threw him in the fishing hole and left him.

Thompson told Newell that "he had buffaloed the detectives" and that he "had the detectives believing that he had put it off on [defendant] so they would get off from him." The prosecutor asked Newell what Thompson had said about defendant. Newell asked the prosecutor if she wanted to hear Thompson's exact words. After the trial court briefly conferred with counsel, the prosecutor asked Newell to give Thompson's exact words. Newell replied, "Danny told me if ran – he said if the baby raping bitch would have kept his mouth shut, we'd have been straight."

On cross-examination, Newell admitted that he knew Thompson and defendant in St. Louis because they were in prison together. He stated that Thompson's nickname was D.T., and defendant's nickname was Fat Boy. He explained that they both belonged to a prison gang known as the Blue Royals or the Simon City Royals. Thompson was an "enforcer" in the gang. Defendant was only a follower. Newell testified that he never heard defendant threaten to kill anyone or say that anyone needed to die. Defense counsel elicited that Beauchamp was the person who Thompson referred to as a "bitch." Upon further cross-examination, the following exchange occurred:

> *Q*. Over here in the Genesee County Jail Mr. Thompson has not been bragging or building up the fact that he is a member of the Royals, has he?
>
> *A*. No, sir.
>
> *Q*. As a matter of fact, he told you keep that on the down low, didn't he?
>
> *A*. Yes, sir.
>
> *Q*. What he has not been keeping on the down low is the fact that he intends to blame Randy Snyder for this whole thing, isn't that right?
>
> *A*. Yes, sir.
>
> *Q*. Told you he's been buffaloing the detectives because he's going to push us all off, or that's one of the ways he's been buffaloing the detectives, is he's going to push this all off on Randy; is that right?
>
> *A*. Yes, sir.

Newell also testified that Thompson had a reputation for violence, and Newell admitted that he had described Thompson as "a monster" in a letter that he wrote to the court.

Newell acknowledged that there was no mention of Thompson's "baby raping" comment in Newell's recorded interview with Lieutenant Shanlian. However, Newell believed that he might have referenced the comment during a pre-interview, which was not recorded. Newell stated that Thompson used the phrase "baby raper" in reference to defendant a couple of times when they talked in jail. Outside the presence of the jury, defense counsel questioned Newell as follows:

> *Q*. In prison parlance, if somebody calls somebody a mother f***ing bitch, they're not saying that the person actually has sex with their mother are they? That's just a common term that's just sort of used routinely and it doesn't say anything about the prisoner except that somebody doesn't like him very well, true?
>
> *A*. Slang, yeah.
>
> *Q*. But if he calls him a baby raping bitch, what does that mean in the prison system?
>
> *A*. That's the bottom of the barrel.
>
> *Q*. Uh-huh. Somebody's been convicted of the crime of raping a baby; is that right?
>
> *A*. Well, you don't have to necessarily be a baby. It could be a child or a teenager. Somebody who molests people.
>
> *Q*. And does it say anything to the listener about why the person is in prison?
>
> *A*. Sure.
>
> *Q*. What? What you just said?
>
> *A*. Sure.
>
> *Q*. And they've been convicted of it?
>
> *A*. That's right.

Codefendant Thompson's counsel also asked Newell whether a prisoner might refer to another prisoner as a "baby raping bitch" as an insult, not as a literal reference to that prisoner's conviction offenses. Newell explained that calling someone a bitch would be a sufficient insult "to spark fire right there," but agreed that the other terms could also be insults.

Defense counsel thereafter moved for mistrial, arguing that

> the testimony of the witness that all of us have been relieved a little bit of our naiveté that we don't understand that when somebody calls somebody else in the prison system a baby raping bitch, it means they've been convicted of raping a baby. The witness has made that very clear. I suspect that the jurors to the extent

> that they focused on this at all, and I hope the heck they did not, but to the extent that anyone of them may have and that that's going to become part of their deliberations.

Counsel explained that he had previously obtained an order precluding reference to defendant's prior convictions and that if he had known that Newell would "refer to a conviction of raping a baby," he would have filed a motion in limine to prevent such testimony. The trial court denied defendant's motion, explaining that the statement was "a derogatory or demeaning term that you could apply to another individual that you're angry with and it never occurred to me that it necessarily meant that he was convicted for that although he was in prison." The trial court also rejected defendant's argument that the statement violated the pretrial order excluding evidence of defendant's prior convictions. Defense counsel renewed his motion for a mistrial two days later, arguing again that Newell's testimony established that the "baby raping bitch" comment was "much more" than merely a derogatory name. The court again denied defendant's motion, explaining that it viewed the statement as only "derogatory, demeaning, insulting terminology."

Sergeant David Dwyre of the Genesee County Sheriff's Department also testified at trial regarding an interview of defendant on April 4, 2006. Defendant told him that Thompson had recognized Beauchamp as someone who robbed the relative of a member of their prison gang. Defendant stated that Beauchamp left the bar with them in defendant's truck and they stopped at a 7-Eleven store where Thompson bought a 40-ounce beer. They drove to a fishing site where Thompson accused Beauchamp of stealing from a gang member's mother. Beauchamp confessed that he did it. Thompson then struck Beauchamp on the face with the beer bottle and knocked him out. According to defendant, Thompson instructed him to get a crow bar, but he refused. Defendant explained that he then watched as Thompson dragged Beauchamp into the river and drowned him. Afterward, Thompson pulled down Beauchamp's pants and digitally penetrated his anus. Thompson and defendant then left.

Sergeant Dwyre testified that he continued to question defendant, who stated "that he had not told 100 percent truth." Defendant then told Dwyre that he had helped Thompson drag Beauchamp into the water and hold him underwater. He explained that he did so because he wanted to fit in with the gang. With Dwyre's assistance, defendant wrote a letter to Lieutenant Shanlian admitting that he helped drag Beauchamp into the water because he wanted to fit in the SCR gang. He stated that he only held Beauchamp underwater for a few seconds and that Beauchamp did not struggle.

Although defendant had been charged with first-degree premeditated murder, the jury convicted him of the lesser offense of second-degree murder.

II. Effective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel because trial counsel's strategy of allowing Newell to testify about his conversations with codefendant Thompson, without having adequately investigated the substance of Newell's proposed testimony, "was grounded on a rotten foundation." Defendant argues that he was prejudiced by counsel's deficiency because the "baby raping bitch" comment was inflammatory and allowed the jury to learn about his prior conviction for a sexual offense against a child. Defendant concedes that he did not raise this issue in a motion in the trial court and that this Court's review

is therefore limited to the existing record. See *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Carbin*, *supra*. First, the defendant must show that counsel's performance was deficient, i.e., that counsel made an error so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id*. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. Second, the defendant must show that the deficient performance prejudiced the defense, i.e., a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

As defendant argues, the decision to allow Newell to testify was a strategic one, given that defense counsel could have precluded his testimony altogether under *Bruton v United States*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968) (holding that a defendant is deprived of his Sixth Amendment right to confront witnesses against him when a nontestifying codefendant's statements implicating the defendant are introduced at their joint trial). See, also, *People v Pipes*, 475 Mich 267, 275-276; 715 NW2d 290 (2006). Indeed, defense counsel acknowledged at trial that it was his strategy to allow the jury to hear Newell's testimony regarding his conversations with Thompson, despite the opportunity to foreclose it under *Bruton*.

Defendant does not argue that counsel's strategy was ill-conceived, but rather that it rested on a "rotten foundation" because counsel failed to adequately investigate Newell's proposed testimony before trial. Defendant argues that if defense counsel or a defense investigator had interviewed Newell before trial, counsel could have reformulated his strategy to avoid exposing the jury to Thompson's "baby raping bitch" remark. However, defendant's argument is based on the speculative assumption that a pretrial interview would have revealed this isolated remark. It is apparent that defense counsel did not anticipate the remark at trial.

Further, the record at trial does not otherwise reveal a reason for counsel to have anticipated that Newell would quote Thompson in the manner that he did, such that counsel could have inquired about the issue in a pretrial interview. Significantly, the remark was not directly related to the three main points of Newell's testimony, namely: (1) to show that more than a year before Beauchamp was killed, Thompson had verbalized a plan to kill someone to avenge a crime committed against a family member or associate; (2) to show that Thompson subsequently admitted his involvement in Beauchamp's murder, although he had also accused defendant of being involved; and (3) to show that Thompson had formed a plan to shift responsibility for the crime to defendant. Newell's testimony on these points meshed with defense counsel's strategy of mitigating defendant's guilt by portraying Thompson as the leader. Although Thompson's ire and contempt for defendant also were related to this strategy, there is no basis for inferring that Thompson's verbatim slur would have been revealed in a pretrial interview. Indeed, the record discloses that Newell did not mention the remark in a recorded pre-interview with Lieutenant Shanlian.

Furthermore, we are not convinced that there is a reasonable probability that the isolated remark affected the outcome of trial. It is unlikely that the jury would have given the phrase "baby raping bitch" its literal meaning, particularly in the absence of any knowledge of the defendant's prior convictions. The full context of the remark, including the shared prison culture between Thompson and Newell, Thompson's contempt and anger toward defendant, and Thompson's and defendant's unequal positions within their gang, suggested that Thompson merely intended a demeaning insult from the prison glossary. Although defense counsel was aware that defendant had a prior conviction for criminal sexual conduct involving a child, such that the remark could be understood in its literal sense, the jury had not been informed of defendant's prior convictions, nor were there other contextual hints suggesting that Thompson was referring to defendant's actual convictions. Thus, unlike defense counsel, the jury had no reason to interpret the remark as anything other than an apparent denigrating slur as the context suggested.

At worst, the remark was an unintended consequence of an otherwise reasonable strategy. The evidence revealed that defendant had been identified as being present with Thompson and Beauchamp shortly before Beauchamp was killed, that defendant had admitted and described his involvement in Beauchamp's death to Robert Thompson, and that defendant also gave a police confession in which he admitted to his participation in the offense, including the act of holding Beauchamp under water and drowning him. Despite this evidence, which would have been sufficient to support a conviction of first-degree murder, the jury convicted defendant of the lesser offense of second-degree murder, suggesting that defense counsel was successful in his strategy of persuading the jury that Thompson was primarily responsible for Beauchamp's murder and had tried to shift blame to defendant, as established through Newell's testimony. "This Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The mere fact that a strategy proves unsuccessful does not "mandate a conclusion that counsel rendered ineffective assistance." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant cites cases in which other courts have found that a defense attorney's failure to investigate was deemed ineffective assistance of counsel, but those cases are factually distinguishable. In *Wiggins v Smith*, 539 US 510, 526; 123 S Ct 2527; 156 L Ed 2d 471 (2003), the defense attorney failed entirely to investigate an indispensable underpinning of an effective death penalty defense, an error of far greater magnitude than defense counsel's failure to discover the isolated remark in this case. In *Ramonez v Berghuis*, 490 F3d 482 (CA 6, 2007), the defense attorney failed to interview three witnesses who were present outside a home where an offense occurred and who could have provided testimony that would have supported the defendant's version of events. Here, Newell's testimony supported the defense strategy of shifting blame to Thompson, and the only alleged error resulting from counsel's failure to interview Newell before trial was the failure to discover an isolated remark, which we conclude was not particularly significant in any event.

For these reasons, we reject defendant's claim that he was deprived of the effective assistance of counsel.

III. Motion for Mistrial

Defendant alternatively argues that even if defense counsel was not ineffective, the trial court erred in denying his motion for a mistrial on the ground that Newell's testimony regarding the "baby raping bitch" comment violated the trial court's pretrial order excluding reference to defendant's prior convictions. We disagree.

We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). A trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

As previously discussed, it is not reasonably probable that the jury would have interpreted the remark as a reference to a prior conviction. The remark did not directly refer to any conviction, and it was made in a context suggesting that it was intended as a demeaning insult. Defendant indicates that Newell subsequently testified that Thompson "said that [defendant] was in prison for that right now." However, that testimony was given outside the presence of the jury. Therefore, it does not support defendant's claim that a mistrial was required. Considering the circumstances, the remark did not prejudice defendant's right to a fair trial and, accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis