STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DAVID LOYD,

Defendant-Appellant.

UNPUBLISHED
January 9, 1998

No. 194107
Recorder's Court
LC No. 95-006631

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to twenty to forty years in prison pursuant to the fourth habitual offender statute, MCL 769.12; MSA 28.1084. We affirm.

Defendant first argues that he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to pursue an insanity or diminished capacity defense. We disagree. Defendant failed to demonstrate that his counsel's performance "was below an objective standard of reasonableness under prevailing professional norms" and that there was "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Counsel's decision to present the accident theory of defense instead of an insanity or diminished capacity defense was a matter of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), and this Court will not substitute its judgment for that of counsel regarding such matters, *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Counsel's selection was a wise one given that two experts reported that they did not find defendant to be insane or acting in a diminished capacity at the time of this incident. Defense counsel would have certainly lost if she pursued these defenses and was not ineffective for failing to present a defense with scant chance of success. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is not ineffective for failing to argue a frivolous or meritless motion).

Further, counsel was not ineffective because her accident theory of defense failed to result in acquittal. *Stewart*, *supra*; *Barnett*, *supra*. Counsel testified that defendant had previously given her different theories of what occurred, so that she could not be certain of how he would testify. Defense counsel chose a wise theory, and it was not her fault if this theory conflicted with the version of events defendant testified to at trial. Defendant was convicted of a reduced charge and received a light sentence, especially given that this was his fourth felony conviction. Therefore, defendant failed to demonstrate that he was prejudiced by his counsel's choice of trial strategy, and in fact, as attested to by the trial court, he was apparently benefited by her competent representation.

Defendant next argues that the trial court improperly admitted his statement to the police because the statement was not voluntary due to his poor state of mind. We disagree. The trial court did not err by admitting defendant's statement because it was not a confession of guilt, and therefore did not require a determination of its voluntariness. *People v Gist*, 190 Mich App 670, 671; 476 NW2d 485 (1991). The statement supported trial counsel's theory that the fire was an accident and did not constitute an admission that defendant committed murder. There was also no evidence on the record that defendant's statement was involuntary. At trial, the investigating officer testified that defendant was advised of his constitutional rights, voluntarily told him what had occurred, and agreed to prepare a written statement in his own handwriting and his own words. The officer also testified that he did not smell any intoxicants on defendant and that defendant seemed alert and oriented to the questions posed to him. Defendant's assertions on appeal that he was under the influence of alcohol, illicit drugs, or prescription medication when his statement was taken the day after the incident are not supported by the record. Further, there is no evidence that defendant's level of intelligence or mental condition prevented him from providing a voluntary statement, particularly in light of the contrary evidence that defendant was lucid during the interview and was able to give a detailed account of events. Even if the admission of the statement was erroneous, it would be harmless error because defendant's statement that an accident occurred could not have contributed to his conviction for second-degree murder. See *People v Anderson (After Remand)*, 446 Mich 392, 405-407; 521 NW2d 538 (1994).

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Stephen J. Markman