STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2003
v	No. 235195 Ingham Circuit Court
PAUL WILLIAM NOWACK, Defendant-Appellant.	LC No. 95-069719-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from an order denying his motion for postappeal relief under MCR 6.500 *et seq.* In June 1996, a jury convicted defendant of two counts of first-degree felony murder, MCL 750.316, and one count of arson of a dwelling house, MCL 750.72. The trial court sentenced defendant to concurrent prison terms of life without parole for each murder conviction.[1] Defendant appealed his convictions and another panel of this Court reversed in *People v Nowack*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 1998 (Docket No. 196655) (*Nowack I*). Thereafter, our Supreme Court vacated the Court of Appeals decision and reinstated defendant's convictions. *People v Nowack*, 462 Mich 392, 410; 614 NW2d 78 (2000) (*Nowack II*). We affirm.

I. Procedural History

The underlying facts in this case are set forth in *Nowack II, supra* at 395-397, and we will not repeat them here. In reviewing the case, our Supreme Court held that, when viewed in a light most favorable to the prosecution, the evidence adduced at trial supported a reasonable inference that defendant intentionally ignited gas that he had released inside his apartment and killed a sixty-seven-year-old woman and a ten-year-old boy who lived in the same apartment building. *Id.* at 404. Regarding the intent requirement, the Court concluded that, in Michigan, common-law arson is a general intent crime. *Id.* at 406. The Court also noted that, as it then read, the standard jury instruction on burning of a dwelling house, CJI2d 31.2, on which the trial court relied, did not "accurately reflect Michigan law regarding common-law arson." *Id.* at 405.

[1] Defendant's sentence of ten to twenty years' imprisonment for the arson conviction was vacated by the circuit court.

Nonetheless, the Court concluded that sufficient evidence was adduced at trial to "establish the elevated level of intent required by CJI2d 31.2(4)." *Id.* at 410.

Thereafter, defendant filed motions in the trial court for relief from judgment and for a *Ginther*[2] hearing. The trial court denied both motions, as well as defendant's motion to reconsider the denial of his request for an evidentiary hearing. Thereafter, this Court granted defendant's delayed application for leave to appeal.

II. Jury Instruction on Intent

Defendant argues that he was denied his right to a fair trial because the trial court erroneously instructed the jury that arson is a specific intent crime rather than a general intent crime. He contends that the error deprived him of the right to have his guilt or innocence determined on an accurate statement of the crime charged. Because defendant did not preserve this issue with an appropriate objection to the court's jury instruction at trial, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice . . . ." *Id.*. Further, if these three requirements are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936).

Nowack II clearly establishes that the trial court erred in instructing the jury on the *mens rea* of common-law arson. *Nowack II*, *supra* at 404-410. However, were we to conclude that the error was "plain," we nonetheless would affirm defendant's convictions because defendant has failed to establish that he is actually innocent or that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines*, *supra* at 763. The prosecutor presented overwhelming evidence to support defendant's convictions under the general intent framework, see *Nowack II*, *supra* at 404, 410, 414. Furthermore, the error placed a greater burden of proof on the prosecutor to prove the intent element and the evidence amply supported the jury's verdict under the appropriate standard. Thus, defendant cannot show that the error undermined the fairness or integrity of the trial.

Furthermore, defendant failed to establish actual prejudice under MCR 6.508(D)(3), and, therefore, he cannot show that he is entitled to relief from judgment. MCR 6.508(D)(3)(b) provides, in relevant part:

> As used in this subrule, "actual prejudice" means that,
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> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

Defendant does not argue that, "but for the alleged error, [he] . . . would have had a reasonably likely chance of acquittal . . . ." Rather, he argues that, absent the error, he would have accepted the prosecution's offer to plead guilty to manslaughter. This argument is both speculative and unconvincing. As noted, overwhelming evidence was presented at trial to support defendant's convictions under the general intent framework. Accordingly, prejudice cannot be established under subrule (D)(3)(b)(i). Furthermore, the strength of the evidence adduced obviates against a finding that "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand . . . ." MCR 6.508(D)(3)(b)(iii). While the instructions were flawed, this is not one of those "rare case[s] in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v Kibbe*, 431 US 145, 154; 97 S Ct 1730; 52 L Ed 2d 203 (1977).

III. Assistance of Counsel

Defendant also raises a two-pronged challenge to the assistance provided by defense counsel at trial. First, he argues that because his theory of defense was predicated on the belief that arson was a specific intent crime, he was, in effect, rendered defenseless at trial because of defense counsel's misunderstanding of the elements of arson. Second, he argues that defense counsel's performance negatively affected the plea process. We find no merit to either argument.

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. "Second, the defendant must show that the deficient performance prejudiced the defense." To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), quoting *Strickland*, *supra* (citations and footnote omitted).]

This *Strickland* test applies to ineffective assistance claims arising out of the plea process. See *Hill v Lockhart*, 474 US 52, 58; 106 S Ct 366; 88 L Ed 2d 203 (1985).

Strickland cautions that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." An objectively unreasonable strategy is different from an incorrect one. *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995) ("Counsel is not ineffective for taking a position . . . objectively reasonable at the time, [which] is later ruled incorrect."). The constitutionally guaranteed right to effective assistance is the right to competent, not perfect, legal representation. *Illinois v Spann*, 332 Ill App 3d 425, 430; 773 NE2d 59 (2002).

Considered in the context of the state of the law in Michigan at the time of trial, we conclude that defense counsel's failure to recognize the error made by all parties at trial did not render counsel's performance deficient, either at trial or during the plea process. It was not until *Nowack II* addressed the issue that the required mental state for common-law arson was clarified. As *Nowack II* observed, "[b]ecause virtually every reported Michigan case involves a statutory arson offense, . . . our cases do not discuss common-law arson." *Nowack II*, *supra* at 406. As penal concepts, specific and general intent are difficult enough when they have been addressed by the courts, see *People v Hood*, 1 Cal 3d 444, 456; 462 P2d 370 (1969), let alone when the case law has been silent on the matter. Further, the fact that both the circuit court and the prosecutor approached all stages of the trial guided by the assumption that arson was a specific intent crime supports the conclusion that defense counsel's performance was in keeping with prevailing norms of performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

Accordingly, defendant is unable to establish the necessary basis for relief under MCR 6.508. In any event, had defendant been able to show that counsel's performance was deficient, reversal would not be warranted. As with defendant's challenge to the instructions themselves, the weight of the evidence adduced at trial precludes a finding that defendant "would have had a reasonably likely chance of acquittal," MCR 6.508(D)(3)(b)(i), or that, "regardless of [the alleged error's] . . . effect on the outcome of the case, the irregularity was so offensive to the maintenance of a sound judicial process that conviction should not be allowed to stand," MCR 6.508(D)(3)(b)(iii).

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder