

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM JAMES WARREN,

Defendant-Appellant.

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UNPUBLISHED

December 11, 2003

No. 237891

Kent Circuit Court

LC No. 00-012238-FC

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(a), and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to the mandatory terms of two years' imprisonment on the felony-firearm conviction, and life without parole on the first-degree murder conviction. He appeals his convictions as of right. We affirm.

Defendant first claims that trial counsel was ineffective for failing to investigate and raise the defenses of diminished capacity or mental defect and of insanity. We disagree.

There is a very strong presumption of effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). A conviction may be reversed due to ineffective assistance only where the counsel's performance fell below an objective standard of reasonableness, and where the ineffective assistance was so prejudicial to the defendant that there is a reasonable probability that but for the ineffectiveness of the assistance, the outcome would have been different. A reasonable probability that the outcome would have been different means one sufficient to undermine confidence in the case's outcome. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 311, 314, 326; 521 NW2d 797 (1994). Because there was no evidentiary hearing on this issue pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to ineffective assistance that is apparent from the existing record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). Judged by this standard, there was no ineffective assistance in failing to pursue the defenses of diminished capacity or mental defect and of insanity.

Michigan does not recognize the defense of diminished capacity or mental defect. In *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001), our Supreme Court held as a matter of statutory interpretation that the Legislature has precluded such a defense. Counsel,

therefore, was not ineffective in not raising the issue, being under no obligation to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). As to the insanity defense, nothing in the record indicates that defendant was legally insane, and there is no reason to infer that this defense would have been successful. Rather, it indicates that defendant, while emotionally distraught, was far from being legally insane. Counsel's strategic choice to limit investigation of this issue was supported by a reasonable professional judgment. This test is the key for evaluating ineffective assistance claims based on failure to investigate under the modified standard recently promulgated by the United States Supreme Court. *Wiggins v Smith*, 539 US \_\_\_\_; 123 S Ct 2527, 2536; 156 L Ed 2d 471 (2003). Because this standard was not violated, there was no ineffective assistance.

Defendant also argues that trial counsel was ineffective for failing to object to the admission of three photographs of the victim's corpse. Alternatively, he argues that the trial court committed clear error in allowing these photographs to be admitted as evidence. We disagree on both points.

The issue is governed by MRE 403. The rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." The photographs were relevant because the location of the wounds and the position of the body helped to establish the intent element of the crime. Moreover, they were not unfairly prejudicial. No blood is visible in the photographs, and they are not particularly gruesome.

The photographs were relevant, and their prejudicial effect did not substantially outweigh their probative value. Thus this claim must fail, whether it is evaluated under the ineffective assistance of counsel standard, or as a challenge to an evidentiary ruling evaluated under an abuse of discretion standard. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant argues next that the trial court committed clear error in denying his request to give the jury a manslaughter instruction. We disagree. A voluntary manslaughter instruction can be appropriate in a murder trial, but only where the facts would support a conviction for manslaughter. *People v Mendoza*, 468 Mich 527, 542; 664 NW2d 685 (2003). We must, therefore, consider whether the evidence would sustain a voluntary manslaughter conviction in this case.

Voluntary manslaughter has been defined as "an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool and reason to resume its habitual control." *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993). Defendant argues that these elements were met, saying he lost control as a result of the great provocation of the victim's conduct with defendant's girl friend.

However, even assuming that the first two elements, influence of passion and adequate provocation, were met, the third element, lack of sufficient time for the influence of the passion to subside, clearly was not. Defendant committed the murder approximately two weeks after he received the provocation. He borrowed a gun to commit the crime, after several earlier unsuccessful attempts to do so, and then drove a considerable distance to the victim's house in

the middle of the night. The crime was not committed in the wake of the provocation, but after considerable time for reflection. The elements of manslaughter were not met, and so the trial court did not err.

Defendant raises three other issues in a Standard 11 supplemental brief. First, he argues that appellate counsel effectively doomed his claim of ineffective assistance of trial counsel by not moving for a new trial or for an evidentiary hearing on the ineffective assistance issue. Because, as we have explained, the claims of ineffective assistance of trial counsel lack merit, appellate counsel was not ineffective by not pursuing it more aggressively. Failure of counsel to champion a meritless position does not constitute ineffective assistance. *Snider, supra*.

Defendant next argues that the Kent County jury pool from which the jury that tried him was selected, as a result of a computer programming miscue, excluded African-Americans from jury service. He states that he could not have raised this issue at the time of trial because the circumstance only came to light after the conclusion of his trial. The exclusion, he argues, deprived him of his right to trial by a jury which is a fair and representative cross-section of the community.

Assuming arguendo that defendant is correct that African-Americans were excluded from the Kent County jury pool, and that his failure to raise the issue at trial can be excused, his claim still must fail. It lacks one of the essential elements of such a claim, that the exclusion be intentional. The United States Supreme Court has ruled that an essential part of any claim of race discrimination in the jury process is a showing of “purposeful discrimination.” *Miller-El v Cockrell*, 537 US 322, 328-329; 123 S Ct 1029; 154 L Ed 2d 931 (2003). Defendant concedes that he has no basis for asserting that the discrimination was intentional. Therefore, his challenge to the jury cannot succeed. Because we resolve the issue on this basis, we express no opinion regarding the factual basis of the claim or its preservation.

Finally, defendant claims that his appellate counsel was ineffective for failing to raise this issue, despite his instruction that she do so. However, the issue is without merit so counsel is not ineffective in not raising it. *Snider, supra*.

Affirmed.

/s/ Michael R. Smolenski  
/s/ David H. Sawyer  
/s/ Stephen L. Borrello