

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL LEE HULON,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 247489

Midland Circuit Court

LC No. 02-001266-FC

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), with first-degree child abuse, MCL 750.136b(2), as the predicate offense, and was sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court erred by failing to grant his request for an involuntary manslaughter instruction. This Court reviews defendant's claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Involuntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541, 544; 664 NW2d 685 (2003). Therefore, "when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Mendoza, supra* at 542.

"Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Mendoza, supra* at 536. Defendant does not claim that the eighteen-month old victim was killed during the commission of a negligently performed lawful act or that the victim was killed by the negligent omission to perform a legal duty. Therefore, defendant must establish that a rational view of the evidence showed that his conduct amounted to the "unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm." *Id.* The record shows that defendant's conduct, at the very least, amounted to the felony of second-degree child abuse. Defendant admitted giving the child a football-type tackle, which caused his head to hit the floor. The medical experts testified that the victim suffered a skull fracture and other severe head injuries. They additionally testified that these injuries could not have occurred from the child falling over and hitting his head, as defendant had earlier claimed. Therefore,

defendant has failed to show that the evidence supported an instruction on involuntary manslaughter and the trial court was not required to instruct the jury on that offense.

Defendant also argues that he was denied the effective assistance of counsel. Whether an attorney failed to provide effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, but questions of constitutional law are reviewed de novo. *Id.* When, as here, a testimonial record has not been created in the trial court, review is limited to deficiencies apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant must show plain error affecting his substantial rights, and this Court should only reverse if he was actually innocent or if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

To establish an ineffective assistance of counsel claim, a defendant must show: (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing norms, and (2) counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that but for counsel's errors, the result of the proceedings would have been different. *Strickland*, *supra* at 694. Furthermore, the defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant first argues that his trial counsel failed to object to numerous instances of prosecutorial misconduct during the trial. However, defendant has not shown any prosecutorial misconduct in this case. In addition, any prejudice was dispelled when the trial court instructed the jury that the lawyer's statements and arguments were not evidence because juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Next, defendant argues that during voir dire a juror was allowed to state at length that the criminal justice system was rigged in favor of the defense. However, defense counsel challenged the juror for cause and the juror was dismissed. Therefore, defendant has failed to show any prejudice.

Defendant also argues that trial counsel failed to properly investigate the case by consulting an expert. Defendant states that the record below is not sufficient and the issue will have to be resolved by a remand back to the trial court for an evidentiary hearing. However, defendant has not complied with MCR 7.211(C)(1). Defendant did not bring a motion to remand within the time period for filing his appellate brief and has failed to provide any evidentiary support regarding facts to be established at the hearing. Defendant merely states that this Court should remand for an evidentiary hearing based on his allegations of trial counsel's failures. This is not sufficient.

Defendant next argues that trial counsel failed to object to a witness's testimony regarding areas outside his expertise. However, defendant has not shown that had counsel

objected to this testimony, it would have affected the outcome of this proceeding. This witness pointed out that he was not an expert and merely agreed that the previous expert testimony seemed reasonable.

Defendant next argues that trial counsel failed to object to written transcripts of defendant's interview with a police detective. However, the transcripts were properly authenticated under MRE 901. Therefore, the transcripts were admissible, and counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Additionally, defendant argues that trial counsel failed to request that the jury be instructed on second-degree child abuse. "This Court will not second guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The decision to not request second-degree child abuse instructions was a matter of trial strategy because instructions on that offense may have reduced the chance of an acquittal.

Finally, defendant argues that the cumulative effect of trial counsel's failures deprived him of a fair trial. However, because there was no error, there was no cumulative error.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald