STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN ADAM ROGERS,

Defendant-Appellant.

UNPUBLISHED
June 22, 2004

No. 247616
Ingham Circuit Court
LC No. 02-000493-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and sentenced to life imprisonment without parole. Defendant appeals as of right. We affirm.

This case arises from the stabbing death of Jerry Beers. The undisputed eyewitness testimony at trial established that the victim was not armed, was not intoxicated, and did not provoke defendant. The victim was seated in a chair when defendant lunged at him and stabbed him in the throat and chest. Defendant, who had been hospitalized in the past for mental illness, presented the defense of legal insanity.

Defendant first argues that the trial court's inadvertent use of the word "really insane," rather than "legally insane" on one occasion during the rereading of the instruction on the defense of insanity deprived him of his right to a fair trial. To preserve an instructional issue for appeal, a party must object to the instruction. MCR 2.516(C); *People v Hall (On Remand)*, 256 Mich App 212, 225; 671 NW2d 545 (2003). A proper objection regarding the instruction must specify the precise objection. *People v Fletcher*, ___ Mich App ___; ___ NW2d ___ (#229092, rel'd 2/10/04) slip op p 14. Because defendant failed to object at trial to the content of the jury instruction when it was reread to the jury, and thus failed to preserve this issue for appeal, this Court reviews the instruction only to determine whether any plain error affected defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

Jury instructions are reviewed de novo as a whole to determine if the trial court made an error requiring reversal. Although the trial court inadvertently used the word "really" on one occasion, on the whole the error did not affect defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). There is no dispute that the trial court's initial instructions to the jury were proper. There is also no dispute that the trial court gave the jury a tape-recorded copy of all of his instructions to use during deliberations. In addition, the trial

court used the correct term of “legal insanity” or “legally insane” on twelve occasions while rereading the instruction. Furthermore, the jury’s question concerned defendant’s burden of proving insanity, not the definition of insanity. Any error in the trial court’s use of the term “really” on one occasion did not affect defendant’s substantial rights.

Defendant also argues that defense counsel was ineffective because he failed to argue self-defense. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The record shows that counsel presented a reasonable, albeit unsuccessful, defense of legal insanity. The decision to argue one defense over another is considered a matter of trial strategy. *People v Hedelsky*, 162 Mich App. 382, 387; 412 NW2d 746 (1987). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App. 74, 76-77, 601 NW2d 887 (1999). Ineffective assistance of counsel can take the form of failure to present a defense only if the defense is meritorious and the failure to present it deprived the defendant of a reasonably likely chance of acquittal. *People v Hunt*, 170 Mich App. 1, 13, 427 N.W.2d 907 (1988); *People v Snyder*, 108 Mich App 754, 756-757, 310 N.W.2d 868 (1981). It is clear from the record that self-defense was not a viable defense in this case. Although defense counsel was not available to testify, a review of the testimony in this case reveals undisputed testimony that the victim was not armed, did not provoke defendant, and was seated in a chair when defendant attacked and stabbed him. There is nothing in the record to show that defendant was acting in self-defense at the time he committed the offense. Defendant has not shown that he had a meritorious defense of self-defense and thus has not shown that counsel was ineffective for failing to present such a defense. “The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette