

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERESA ANN DUNIGAN-SNELL,

Defendant-Appellant.

UNPUBLISHED

October 23, 2008

No. 280522

Kalamazoo Circuit Court

LC No. 07-000199-FC

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right her jury convictions of second-degree murder, MCL 750.317, and perjury, MCL 767A.9(1)(b).¹ We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from a house fire in Kalamazoo on June 17, 2006, which killed one resident and severely injured another resident. The fire was set by Lonnie Warren (who was convicted of first-degree murder for his role), with help from various individuals, including defendant's son, Marcel Dunigan, and her grandson, Richie Edmonds. However, according to the prosecution's theory of the case, defendant instigated the arson because she wanted to drive the victims, George McCormack and Deb Jarchow, out of their home and out of the neighborhood. Defendant's perjury conviction resulted from false answers defendant gave during an investigative subpoena proceeding.

On appeal, defendant argues that trial counsel rendered ineffective assistance by failing to object to the trial court's jury instruction on second-degree murder. We disagree.

Jury instructions are reviewed as a whole rather than piecemeal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001); *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions do not warrant reversal if they fairly

¹ Defendant was initially charged with felony murder, but was acquitted of that greater charge, as well as related charges of arson of a dwelling house and conspiracy to commit arson of a dwelling house.

present the issues to be tried and sufficiently protect the defendant's rights. *Aldrich, supra*; *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

Acknowledging that counsel failed to object to the instruction, defendant raises this claim as one of ineffective assistance. In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). If the defendant fails to preserve the issue, appellate review is “limited to mistakes apparent on the record.” *Id.* “If the record does not contain sufficient detail to support defendant’s ineffective assistance claim, then he has effectively waived the issue.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Because defendant did not move for a new trial or a *Ginther* hearing before the trial court, our review of her ineffective assistance claim is limited to mistakes apparent on the record. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

“Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.*

The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 71; 731 NW2d 411 (2007); *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). “Malice” is defined as an act done with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). This last state of mind has also been described as “the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Goecke, supra* at 464.

Defendant was charged under an aiding and abetting theory. The elements of aiding and abetting are: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Carines, supra* at 757. Aiding and abetting includes all types of assistance given to a principal and all words or acts that may support the commission of a crime. *Id.*

In the instant case, we disagree with defendant’s assessment of the trial court’s instructions. When read as a whole, these instructions required the jury to find that the arson

caused McCormack's death, that defendant helped another commit the arson, and that she acted with malice, i.e., an intent to kill, to do great bodily harm, or a willful disregard of the likelihood of death or great bodily harm. Defendant's contention that the instructions would have allowed the jury to find her guilty if she assisted someone other than the arsonist, or with a crime other than the arson is without merit. The trial court's use of "someone she helped" clearly referred to defendant's alleged role as an aider and abettor to the arsonist Warren. The trial court's instructions prior to the second-degree murder instruction outlined the crime of arson and discussed aiding and abetting, and the trial court's next sentence clarified this point by requiring the jury to find that McCormack died of injuries sustained in the arson fire. Thus, because the trial court provided appropriate instructions, counsel's decision to not object did not constitute ineffective assistance. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that, if this Court reverses her murder conviction, she would then be entitled to resentencing on her perjury conviction. However, because this we affirm defendant's murder conviction we need not reach this issue.

Affirmed.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood