

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 20, 2013

v

GERALD NASH,

Defendant-Appellant.

No. 310703
Wayne Circuit Court
LC No. 12-001082-FC

Before: BOONSTRA, P.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for involuntary manslaughter, MCL 750.321, second-degree vulnerable adult abuse, MCL 750.145n(2), eight counts of uttering and publishing, MCL 750.249, embezzlement from a vulnerable adult of \$1,000 or more but less than \$20,000, MCL 750.174a(4)(a), false pretenses of \$1,000 or more but less than \$20,000, MCL 750.218(4)(a), and identity theft, MCL 445.65. Defendant was sentenced as a second habitual offender, MCL 769.10, to 86 months to 15 years' imprisonment for the involuntary manslaughter conviction, three months to six years' imprisonment for the second-degree vulnerable adult abuse conviction, four to 15 years' imprisonment for each uttering and publishing conviction, four to seven years and six months' imprisonment for the embezzlement conviction, four to seven years and six months' imprisonment for the false pretenses conviction, and four to seven years and six months' imprisonment for the identity theft conviction. We affirm.

I. FACTUAL BACKGROUND

William Huston was an elderly, disabled amputee who hired defendant as his full-time caregiver. Huston paid defendant \$500 a week for the care of himself and his apartment. In August 2010, an extensive bed bug infestation was discovered inside the apartment where Huston and defendant were residing. This led to an investigation by the apartment managers and Adult Protective Services. During the investigation and the extermination of the bed bugs, it was discovered that Huston was not well cared for and suffered from serious physical ailments resulting from neglect. Huston was repeatedly asked to be transported to the hospital to receive medical treatment, a request which he refused until after defendant spoke with him. Eventually, Huston was transported to the hospital and was treated for dehydration, electrolyte imbalance, and urosepsis. He died three days after being admitted into the hospital from a massive urinary

tract infection that had entered his bloodstream. During the time that Huston was in the hospital defendant wrote and cashed numerous checks written on Huston's bank account and payable to defendant.

II. ANALYSIS

Defendant argues that he received ineffective assistance of counsel because his attorney failed to request a jury instruction regarding the right of a competent adult to refuse medical treatment. The determination of effective assistance of counsel entails questions of both fact and constitutional law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). We review questions of constitutional law de novo, while we review a trial court's factual findings for clear error. *Id.* "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). With regard to unpreserved issues, our "review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

In order to successfully claim ineffective assistance of counsel a defendant must pass the test set down by the United States Supreme Court in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that his attorney's actions fell below an objective standard of reasonableness guided by prevailing professional norms. *People v Nix*, __ Mich App __ ; __ NW2d __ (Docket No. 311102, issued May 23, 2013), slip op, p 6. Second, a defendant must prove that this failure caused prejudice, that is, the probability that but for this error the outcome of the trial would have been different. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Cases regarding the ineffective assistance of counsel require the defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (citation omitted). Furthermore, the defendant carries the burden of proof to refute the presumption that counsel's assistance was effective. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

Regarding the first prong of the *Strickland* test, failing to request a jury instruction reflecting the right of a competent adult to refuse medical care can be considered valid trial strategy. While defense counsel did raise the argument that defendant could not force Huston to go to the hospital because he was a competent adult, defense counsel primarily spent time arguing that defendant did not provide negligent care, because the care defendant provided was satisfactory to Huston. It is a valid trial strategy to focus on the theory that while defendant's care may have been objectionable to some people, it was in fact sufficient to the person being cared for. In *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986), the Court held that an attorney's failure to request a defense instruction that was in conflict with the defense's strategy was not ineffective assistance of counsel. Similarly, in this case it would have been contradictory to request an instruction regarding Huston's right to refuse treatment when defendant's primary strategy was that Huston did not need treatment because his care was sufficient.

Additionally, emphasizing that Huston had the right to refuse treatment may have harmed defendant because although conflicting evidence was offered regarding whether defendant previously asked Huston to go to the hospital, when he did ask, Huston agreed to go. It is

reasonable that defense counsel would not want to dwell on the fact that Huston agreed to receive medical care when defendant asked, and would instead more heavily rely upon the argument that defendant was not negligent in his care. It is possible that defense counsel chose to spend more time arguing that defendant's care prior to the attempt to get Huston to go to the hospital was not negligent, since much of the prosecution's case relied on establishing the lack of care Huston received prior to hospitalization. We have repeatedly held that the court will not override the judgment of counsel in matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Therefore, failing to request such a jury instruction was a matter of trial strategy and did not fall below an objective standard of reasonableness.

Second, even if defendant could successfully argue that failing to request such a jury instruction was not objectively reasonable, defendant cannot establish he was prejudiced by such an error. As noted earlier, prejudice is found when it is reasonably probable that but for the error the outcome of the trial would have been different. To determine this, "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." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation marks and citation omitted).

Defendant has failed to establish prejudice because, even if the omission of a jury instruction regarding the right to refuse medical treatment was an error, it was not one that would change the outcome of trial. Dr. Cheryl Loewe, the medical examiner, testified that Huston had untreated diabetes, was not properly cleaned after using the bathroom (which resulted in the urinary tract infection that later caused his death), had bug bites on his body, and had experienced a stroke. Angela Vardiman-Williams, Huston's neighbor, found that the bed bug activity was extensive in Huston's apartment and that Huston was lying in a medical bed, naked from the waist down, and covered in little red spots. The APS agents who investigated found that Huston was nodding, foaming at the mouth, generally looked like he needed medical attention, and was not "with it." And, two witnesses testified that they heard defendant say that cleaning Huston's bed after every bowel function would result in a "mountain of laundry," and it would be unreasonable to expect defendant to take care of it. Given that there was evidence establishing that defendant was negligent in his care of Huston, a jury instruction regarding Huston's right to refuse medical treatment would not have changed the outcome of the trial. Consequently, defendant received effective assistance of counsel.

Affirmed.

/s/ Mark T. Boonstra

/s/ David H. Sawyer

/s/ Christopher M. Murray