

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD A. WALKER,

Defendant-Appellant.

UNPUBLISHED

March 22, 2005

No. 249406

Wayne Circuit Court

LC No. 00-009268-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

I

Defendant appeals an order that denied his motion for new trial following a *Ginther*¹ hearing. A jury convicted defendant of first-degree murder² and possession of a firearm during the commission of a felony (“felony-firearm”).³ The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, and to two years for the felony-firearm conviction. Defendant appealed his convictions, and this Court held, in an unpublished opinion, that, with regard to defendant’s ineffective assistance of counsel claim, trial counsel’s failure to pursue an insanity defense was “objectively unreasonable,” and that “trial counsel’s decision to forego the insanity defense was a serious error that fell below an objective standard of reasonableness,” and was not a “matter of trial strategy.”⁴ Accordingly, this Court remanded the case for a *Ginther* hearing on whether counsel’s failure to seek an independent evaluation of defendant in support of an insanity defense was prejudicial.⁵ At the *Ginther* hearing, the trial court ruled that defendant failed to establish prejudice by his lawyer’s ineffectiveness. We affirm.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² MCL 750.316.

³ MCL 750.227b

⁴ *People v Walker*, unpublished opinion per curiam of the Court of Appeals, issued January 3, 2003 (Docket No. 233494), slip op, p 3.

⁵ *Id.*, slip op, pp 3-4.

Defendant argues that he was denied the effective assistance of counsel because his trial counsel's failure to seek an independent psychiatric evaluation to support the presentation of an insanity defense was prejudicial. In reviewing a claim of ineffective assistance of counsel, a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).⁶

II

We agree with the lower court's finding that defendant failed to establish the required showing of prejudice. Ineffective assistance of counsel includes the failure to investigate and present an insanity defense. However, reversal is warranted 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, 16-17; 427 NW2d 907 (1988). Here, defendant failed to show that his trial counsel had reason to believe that defendant may have been suffering from a mental illness that rendered him legally insane at the time of the offense. MCL 768.21a(1). Although counsel believed that defendant was mentally ill, he did not think that defendant would be successful in proving his legal insanity. Before trial, defendant did not tell counsel that defendant was hearing voices at the time of the offense or that he blacked out. Instead,

⁶ To establish a claim that defendant was denied his state or federal constitutional right to the effective assistance of counsel, he must show: (1) his attorney's representation fell below an objective standard of reasonableness and (2) this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove the first factor of the test, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Leblanc, supra*, 465 Mich 578; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove the second factor of the test, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Leblanc, supra* at 578; *Toma, supra* at 302-303.

First, we note that the law of the case doctrine applies to this Court's prior opinion in this case wherein it concluded that defendant's claim of ineffective assistance of counsel satisfied the first factor of the *Strickland* and *Pickens* test. Whether the law of the case doctrine applies is a question of law that is reviewed de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Under that law of the case doctrine, an appellate court's determination of an issue in a specific case is binding on lower tribunals on remand and also upon the appellate court in subsequent appeals. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The doctrine applies only to issues actually decided, either implicitly or explicitly, in the previous appeal. *Id.* Moreover, "an appellate court's determination of law will not be differently decided . . . if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

After this Court issued its unpublished opinion addressing defendant's ineffective assistance of counsel claim, and remanded this case for a *Ginther* hearing on the remaining question of prejudice, there has not been a material change in the facts. Thus, the law of the case doctrine applies to this Court's prior opinion in this case, and prevents us from reconsidering the first factor of the test. Accordingly, the sole issue on appeal is whether defendant's claim of ineffective assistance of counsel satisfied the prejudice factor of the test.

defendant had a good recollection of the incident and wanted to testify at trial that he acted in self-defense. The competency and criminal evaluation of defendant by Dr. Dexter Fields concluded that defendant was competent to stand trial and that he was not mentally ill at the time of the offense. Defendant appeared coherent during his interview with Dr. Fields and nothing in the police investigator's report or in defendant's narrative suggested that defendant appeared confused. Therefore, counsel believed that even if he could obtain an independent evaluation to support defendant's insanity defense, it would not have had much effect on the jury's decision. Counsel was concerned about a compromise verdict finding defendant guilty but mentally ill. Because mental illness short of legal insanity does not relieve a defendant from criminal responsibility, *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001), defendant failed to show that he had a meritorious insanity defense, and thus, failed to show that counsel was ineffective for failing to present such a defense.

Further, defendant's actions, such as picking up the clip after the shooting, leaving the scene of the crime, going into the abandoned house and hiding the gun in a hole, suggest that defendant recognized the consequences of his criminal behavior, and that his behavior was wrongful. The evidence further shows that defendant lied to police by giving them aliases on three different occasions. Even with Dr. Stephen Miller's testimony in favor of an insanity defense, in light of evidence that defendant had the consciousness of guilt, we conclude that there is not a reasonable probability that defendant had a likely chance of acquittal.

Additionally, the evidence shows that defendant alleged self-defense to his counsel and, at trial, defendant testified clearly and consistently in his own behalf that he acted in self-defense. As such, we are unable to conclude that counsel's decision to advance defendant's self-defense claim deprived defendant of a substantial defense.

Based on our review of the record, we hold that defendant failed to establish prejudice with respect to his allegation of receiving the ineffective assistance of counsel. Therefore, we hold that the lower court correctly denied defendant's motion for new trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski