

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

J.D. ANGELO CROSS,

Defendant-Appellant.

UNPUBLISHED

July 1, 1997

No. 184155

Recorder's Court

LC No. 93-014406

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to twenty to thirty years in prison. We affirm.

Defendant's first argument on appeal is that he was denied effective assistance of counsel when his trial counsel failed to object to the admission into evidence of an exhibit of a statement of defendant's mother, Patricia Sanford. We disagree. Because defendant has not moved for a *Ginther*¹ hearing or a new trial, our review is limited to mistakes of trial counsel which are apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). "Effective counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In order to establish ineffective assistance, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that but for his counsel's error, there is a reasonable probability that the outcome of the trial would have been different (i.e. that defendant was prejudiced so as to deprive him of a fair trial). *Id.*; *Nantelle, supra*, p 87.

Defendant contends that Sanford's statement should not have been admitted as an exhibit pursuant to MRE 803(5), which provides that a memorandum or record containing a recorded recollection may, under certain conditions, "be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." Defendant argues that his counsel's failure to object to the admission of Sanford's statement as an exhibit was error given that it was a statement of a nonparty and was therefore not offered by an adverse party. We do not reach the issue whether counsel's failure to object constituted deficient performance, because we hold that even assuming *arguendo* that defendant

has satisfied the first requirement for establishing ineffective assistance, he has not met the second requirement because he has not shown that there is a reasonable probability that the outcome of the trial would have been different but for his counsel's alleged error.

We note that this Court has rejected claims of ineffective assistance on the grounds that the defendant failed to show prejudice resulting from a failure to object where there is other evidence of the defendant's guilt. See *People v Launsbury*, 217 Mich App 358, 361-362; 551 NW2d 460 (1996); *People v Alderete*, 132 Mich App 351, 361; 347 NW2d 229 (1984).

In the case at bar, defendant has not shown that there is a reasonable probability that the result of the trial would have been different but for counsel's failure to object to the admission of Sanford's statement. Defendant argues that counsel's failure to object to admitting the statement as an exhibit was prejudicial because the jury could examine it during deliberations and therefore give Sanford's statement more attention than her testimony. We reject this argument because of the quantity of evidence of defendant's guilt apart from the statement. It is true that in her statement Sanford indicated that defendant told her that he shot the victim because the victim had tried to rape defendant's sister. However, this statement is no more damaging than Sanford's testimony at trial that defendant told her that he shot the victim because the victim had tried to rape defendant's sister and was selling drugs to Sanford. In addition, a police officer testified regarding defendant's statement to the police in which he admitted shooting the victim twice. Defendant's statement was consistent with the stipulated testimony of a forensic pathologist regarding the likely manner in which the victim was shot. Another witness testified that she overheard defendant state that he was going to kill the victim. Therefore, given the quantity of evidence of defendant's guilt apart from Sanford's statement, we hold that defendant has not shown that there is a reasonable probability that the result of the trial would have been different but for defense counsel's failure to object to admission of the statement. Therefore, defendant's ineffective assistance of counsel argument must fail.

Defendant's second argument on appeal is that the trial court gave incorrect instructions regarding the definition of malice. We disagree. Because defendant did not object to the trial court's instructions, we review only for manifest injustice. *People v Kelly*, 423 Mich 261, 272; 378 NW2d 365 (1985). Jury instructions are to be examined as a whole rather than extracted piecemeal to determine whether the trial court erred. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "Even if the instructions are imperfect, reversal is not required if they presented the issues to be tried and sufficiently protected the rights of the defendant." *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996).

When instructing the jury on the elements of second-degree murder, the trial court stated that the prosecution had to show that defendant had one of the following states of mind: "he intended to kill, or he intended to do great bodily harm to [the victim], or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions." Defendant contends that this instruction does not comport with the Supreme Court's definition of malice as "the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the

likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm." *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

The trial court correctly stated the definition of malice. The trial court followed verbatim the language of CJI2d 16.5, the instruction on second degree-murder. "Although use of the standard criminal instructions is not mandated, their use will be upheld if the instruction accurately states the law." *Alderete, supra* at 356. Here, there is no question but that the instruction accurately states the law. See *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). In *Bell, supra* at 275-276, the defendant, who was convicted of first-degree felony murder, argued that the trial court failed to instruct on malice. This Court disagreed, and noted that the trial court correctly instructed the jury that to convict, "defendant must have acted with the intent to kill, or to do great bodily harm, or knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions." *Id.* at 276. This Court thus approved of a definition of malice which is virtually identical to the definition complained of by defendant. We therefore hold that the trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.* at 276-277.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad

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