

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 16, 2011

v

MARK DWAYNE COX,
Defendant-Appellant.

No. 297532
Kalamazoo Circuit Court
LC No. 2009-001802-FC

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant was convicted of first-degree felony murder, MCL 750.316; unlawful imprisonment, MCL 750.349b; unlawfully driving away an automobile, MCL 750.413; and three counts of stealing or retaining a financial-transaction device without consent, MCL 750.157n. Defendant was sentenced to life without parole for first-degree felony murder, 15-50 years for unlawful imprisonment, 3-15 years for unlawfully driving away an automobile, and 30 months to 15 years on each count of stealing or retaining a financial-transaction device without consent. Defendant now appeals. We affirm.

I

Police found the victim deceased in her apartment, partially wrapped in a blanket or sheet, bound, and gagged. Police found defendant Mark Cox's fingerprints on the victim's bedroom door. After obtaining security-camera video from a business where the victim's stolen ATM card was used, the police found defendant inside the victim's automobile in Detroit, where they arrested him. Defendant made a full confession. According to defendant's confession, he went into the victim's apartment with the intent to rob her; defendant bound and gagged the victim before leaving to use her ATM card, but when he returned later, the victim was dead.

II

Defendant contends that he was denied effective assistance of counsel when his trial counsel failed to request an involuntary-manslaughter instruction. We disagree.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact should be reviewed for clear error and questions of law should be reviewed de

novo. *Id.* To show ineffective assistance of counsel, defendant must show that counsel's errors were so serious that defendant was deprived of a fair trial and that the trial itself was seriously prejudiced. *Id.* at 578. An appellate court must review under a strong presumption that trial counsel's conduct was sound trial strategy. *Id.* An appellate court should not substitute its judgment for trial counsel's nor should it review trial counsel's decisions with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

While trial counsel's strategy did not work, defendant's trial counsel did have a thought-out strategy. That strategy was to focus on the accident defense because she was concerned that arguing involuntary manslaughter would be too close to what the prosecutor was arguing regarding the mens rea for murder. That is, such an argument might have served to support the prosecutor's malice argument. This Court will not substitute its judgment for trial counsel's based on the fact that the strategy did not work. *Matuszak*, 263 Mich App at 58.

III

Plaintiff next contends that he received ineffective assistance of counsel when his trial counsel failed to object to or clarify the different uses of accident throughout trial. We disagree.

If an issue is not preserved at trial, an appellate court should review for plain error that substantially affects the rights of defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To show plain error, defendant must show an error that substantially affected the fairness or integrity of the proceeding. *Id.* Whether a person has been denied effective assistance of counsel is a mixed question of fact and law. *LeBlanc*, 465 Mich at 579. A trial court's findings of fact should be reviewed for clear error and questions of law should be reviewed de novo. *Id.*

Defendant did not request a cautionary instruction at trial, so this issue has not been preserved and will be reviewed for plain error. Defendant contends that, without a jury instruction, the jury may have been confused over the use of an accident defense and "accident" as that term was used by the pathologist regarding manner of death. When looking at jury instructions, an appellate court "reviews the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

Defendant alleges no proof or facts of prejudice. Furthermore, defendant shows no evidence that the jury was actually confused by the different meanings. Because defendant only points to a chance that the jury was confused and no proof, defendant has failed to establish that the judge's not instructing the jury about the usage of accident was a plain error that substantially affected the fairness of the proceeding.

Furthermore, defendant's trial counsel saw a chance for confusion between the accident defense and the pathologist's use of accident. Therefore, she questioned the pathologist until he defined "accident" more as it pertained to his field. The trial judge concluded that this was sufficient to clear up any confusion. Beyond that, there was no evidence that the jury was actually confused on this issue.

IV

Defendant also argues that the trial court erred in failing to instruct the jury that the prosecutor had the burden of proving beyond a reasonable doubt the inapplicability of the accident defense. We disagree.

Jury instructions are reviewed de novo to determine whether, taken as a whole, they are sufficient to protect defendant's rights. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). When looking at jury instructions, an appellate court "reviews the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *Dumas*, 454 Mich at 396.

The jury instructions indicated that the prosecution must prove every element of the charge beyond a reasonable doubt. Furthermore, the instructions indicated that the defendant was not required to prove his innocence or to do anything. Then, in discussing the felony-murder charge, the trial judge specifically stated that an element of the crime was that defendant intended to kill or intended to do great bodily harm. While the jury instruction may have not specifically indicated that the prosecution must specifically disprove defendant's accident defense, the accident defense was defendant's attempt to show that he did not intend to hurt the victim. Because the jury instruction indicated that the prosecution must prove intent beyond a reasonable doubt, defendant has failed to show that the jury instruction was insufficient to protect his rights.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens