

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP MARTIN FRITTS,

Defendant-Appellant.

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UNPUBLISHED

October 16, 2003

No. 239276

Leelanau Circuit Court

LC No. 01-001194-FH

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant Philip Martin Fritts appeals as of right from his conviction by a jury of arson of a dwelling house, MCL 750.72, and larceny in a building, MCL 750.360. The trial court sentenced him to 51 months' to 20 years' imprisonment for the arson conviction and to 18 months' to 4 years' imprisonment for the larceny conviction. We affirm.

Defendant first argues that his trial attorney rendered ineffective assistance of counsel. We disagree. Whether a defendant "has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while the court's constitutional determinations are reviewed de novo. *Id.*

The right to counsel in a criminal proceeding is a substantive right guaranteed by the United States and Michigan constitutions. US Const, Am VI; Const 1963, art 1, § 20. With regard to a claim of ineffective assistance of counsel, this Court focuses its analysis on the actual assistance received rather than mere form. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To prove ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. *Id.*; *Strickland v Washington*, 466 US 668, 687-694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 330-331; 521 NW2d 797 (1994). Additionally, a defendant must show that the proceedings were unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. See *LeBlanc*, *supra* at 578. A defendant can overcome the presumption by

showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987).

A defense attorney is given discretion in devising the strategy of his case; counsel is not judged or condemned based on hindsight. *Pickens, supra* at 330; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721, (1995). In the instant case, after a review of defendant's psychological evaluation by the state Center for Forensic Psychiatry, counsel chose not to assert a defense of insanity, but he did assert a defense of voluntary intoxication. Further, instead of seeking a second opinion, he chose to rely on the professional opinion included in the report by the Center for Forensic Psychiatry. This decision was reasonable, because a licensed psychologist performed the original evaluation. She interviewed defendant for three hours and twenty minutes, and she administered and interpreted standardized psychological testing. Counsel's decision not to order a secondary evaluation did not deprive defendant of a fair and impartial trial because it was reasonable to rely on the opinion of a qualified professional using standardized methodology. Importantly, while a defendant may request a second independent psychological examination, MCL 768.20a(3), such an examination is not mandatory. Based on the available record, we discern no evidence of ineffective assistance of counsel.

Moreover, contrary to defendant's suggestion on appeal, evidence of mental incapacity that falls below insanity, such as diminished capacity, is not an affirmative defense and cannot negate specific intent. See *People v Carpenter*, 464 Mich 223, 225-226, 241; 627 NW2d 276 (2001). Therefore, counsel was not ineffective for failing to present a defense of diminished capacity. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("counsel is not required to advocate a meritless position").

Defendant also argues that the prosecuting attorney committed misconduct requiring reversal during closing arguments by denigrating defense counsel. We disagree that reversal is warranted. Generally, we review claims of prosecutorial misconduct de novo, but we examine for clear error the factual findings the trial court makes in conjunction with a misconduct claim. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Here, defense counsel's untimely objection resulted in the misconduct issue not being preserved for appeal; however, we may review the issue if the failure to do so would result in a miscarriage of justice. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The test for prosecutorial misconduct is whether the defendant has been denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Each claim is decided on a case-by-case basis, and the prosecutor's remarks must be reviewed in context. *Id.* When a prosecutor includes issues that are broader than the determination of the defendant's guilt, the defendant's opportunity to receive a fair trial is diminished. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). The prosecutor may not assert that defense counsel is trying to mislead the jury, *Watson, supra* at 592, or denigrate opposing counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996). However, improper remarks may not require reversal if they are raised in reply to issues introduced by the defense. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977), and *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

We conclude that defendant waived his claim of prosecutorial misconduct because defendant does not specify which of the prosecutor's comments he finds objectionable. See, e.g., *Watson, supra* at 587, and *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Moreover, we discern no prosecutorial misconduct because the prosecutor merely commented fairly on the evidence and responded to issues raised by defendant and his counsel. Also, contrary to defendant's argument on appeal, defense counsel's failure to object in a timely fashion to the prosecutor's comments was not unreasonable and did not affect the outcome of the case. See *Pubrat, supra* at 596.

Affirmed.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Bill Schuette