

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 24, 2012

v

LARRY LOUIS HUNTER, JR.,

No. 300689
Washtenaw Circuit Court
LC No. 10-000107-FC

Defendant-Appellant.

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of one count of first-degree murder, MCL 750.36, one count of possession of a firearm during the commission of a felony, MCL 750.2276, and one count of being a felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a third habitual offender, MCL 769.11, to life without parole.

On appeal, defendant argues that the trial court denied him his right to a public trial by excluding his sister from the courtroom during voir dire. Alternatively, defendant argues that his trial counsel was ineffective for failing to object to the exclusion of his sister from the courtroom during voir dire. We conclude that the exclusion of the sister from the courtroom was not plain error affecting substantial rights, and that defendant's trial counsel was not ineffective, as the failure to object was not objectively unreasonable and defendant has made no affirmative showing of prejudice. Accordingly, we affirm.

I. FACTS

Defendant was charged with first-degree murder, possession of a firearm during the commission of a felony, and being a felon in possession of a firearm in connection with the shooting death of Jamar Gardner. On the first day of trial, prior to voir dire, defense counsel asked the trial court if it would be a problem if defendant's sister sat in the courtroom during voir dire. The trial court responded that she could not, stating that "we're going to need that room." Defendant's sister then left the courtroom until the conclusion of voir dire. Defendant was subsequently found guilty of all charges and was sentenced to life without parole.

Following his conviction, defendant appealed and filed a motion to remand to the trial court so that an evidentiary record could be made concerning the circumstances surrounding his sister's exclusion from the courtroom. This Court granted the motion to remand and, following

an evidentiary hearing, the trial court found that defendant's right to a public trial was not violated by the exclusion of his sister from the courtroom during voir dire, and that defendant's trial counsel was not ineffective for failing to object to her exclusion.

II. RIGHT TO A PUBLIC TRIAL

A. STANDARD OF REVIEW

We review questions of constitutional law de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended on other grounds, 481 Mich 1201; 750 NW2d 165 (2008). Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Vaughn*, ___ Mich ___; ___ NW2d ___ (Docket No. 142627, issued July 9, 2012), slip op at 19-21.

B. ANALYSIS

Defendant argues that the trial court's exclusion of his sister from the courtroom during voir dire entitles him to a new trial. We disagree.

A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. See *Presley v Georgia*, 558 US ___; 130 S Ct 721, 724, 175 L Ed 2d 675 (2010). Although there are exceptions to the right, the trial court may not close the courtroom to the public unless the party seeking closure advances an overriding interest that is likely to be prejudiced and the trial court considers all reasonable alternatives to closing the proceeding. *Id.* at 724. A defendant's failure to object to the closing of the courtroom does not extinguish a trial court's error, but it does forfeit the claim of error and subject it to plain error analysis. *Vaughn*, slip op at 19-20.

In the instant case, defendant requested that his sister be allowed to sit in the courtroom during voir dire. However, a mere request for the presence of family during voir dire is not a legal objection to their exclusion. *People v Orlewicz*, 293 Mich App 96; 809 NW2d 194 (2011). As such, defendant is only entitled to relief if he can establish that the exclusion of the sister was plain error affecting his substantial rights. In order to establish plain error, a defendant must show that (1) the error occurred, (2) the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, 460 Mich at 763-764.

Given the facts of this case, it appears that the first three prongs of the *Carines* test may be met here. First, the trial court arguably erred by excluding defendant's sister during voir dire without articulating an overriding interest or considering available alternatives. Second, the error was plain, as the defendant's Sixth Amendment right to public trial clearly extends to voir dire. Third, a violation of the right to a public trial is a structural error that is intrinsically harmful. *Vaughn*, slip op at 22-23.

Nevertheless, even assuming that the first three prongs of the *Carines* test have been met, the record fails to establish that the fourth and final prong of the *Carines* test has been met. In order to satisfy this prong, a defendant must show that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Here, there is no evidence to suggest that defendant is actually innocent. Moreover, while the temporary exclusion of defendant's sister from the courtroom during voir dire may have affected the fairness, integrity, or public reputation of the judicial proceedings, there is nothing to suggest that her exclusion *seriously* affected the fairness, integrity, or public reputation of the judicial proceedings. *Vaughn*, slip op at 23. Where, as here, the exclusion of the sister was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that such a closure seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Vaughn*, slip op at 25-26. Defendant has therefore failed to establish that the trial court's actions were plain error affecting substantial rights, and is not entitled to a new trial.

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

The deprivation of effective assistance of counsel presents a mixed question of fact and constitutional law. *Dendel*, 481 Mich at 124. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

B. ANALYSIS

Defendant also argues that he was denied the effective assistance of counsel due to his trial counsel's failure to object to his sister's exclusion from the courtroom during voir dire. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant also must show that he was so prejudiced as to deny him a fair trial. *Id.* at 303, 312. To establish such prejudice, a defendant must show that there is a reasonable probability that the alleged error made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, 446 Mich at 312.

Here, defendant alleges that his trial counsel's failure to object to the closing of the courtroom during voir dire fell below an objective standard of reasonableness. However, defendant does not allege how this failure to object was deficient under this standard. Moreover, our Supreme Court rejected a similar argument in *Vaughn*, noting that there are numerous strategic advantages that a defendant can gain from voir dire taking place in private, and holding that failure to object to the closing of a courtroom during voir dire is not objectively unreasonable. *Vaughn*, slip op at 27-28.

Further, even if trial counsel's failure to object was objectively unreasonable, defendant still must establish that, but for counsel's mistake, a reasonable probability exists that the result of the trial would have been different. In order to do so, however, defendant must make a showing of actual prejudice. *Vaughn*, slip op at 31. Here, defendant has failed to give any

explanation of how he was prejudiced by trial counsel's failure to object to the exclusion of defendant's sister from the courtroom during voir dire. As such, defendant has failed to make the required showing of actual prejudice. Moreover, given the facts of this case, it would be implausible to suggest that the result of defendant's trial would have been different had defendant's sister been allowed to sit in the courtroom during voir dire. Accordingly, defendant has not established either prong of the test for ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio

/s/ Amy Ronayne Krause

/s/ Mark T. Boonstra