STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2013
v	No. 306473 St. Clair Circuit Court
JAMES LESLIE PRESTON, Defendant-Appellant.	LC No. 10-002937-FC

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree murder, MCL 750.316(1)(a), attempted murder, MCL 750.91, and conspiracy to commit murder, MCL 750.157a; MCL 750.316(1)(a). Defendant was sentenced to life imprisonment without parole. We affirm.

Tia Skinner (Tia) apparently decided to kill her parents when they stopped her from seeing her then boyfriend, Jonathon Kurtz. The victims were viciously attacked in their bed in November 2010. Tia's father was killed and Tia's mother suffered roughly 25 stab wounds. An investigation led to Kurtz and defendant, who was Kurtz's associate. The investigation also lead to discovery of a map of the neighborhood and a note containing tips on how to break into Tia's house and commit the murders. Cell phone records showed text messages between Tia, Kurtz, and defendant that indicated the planning of the crimes. During one of his interviews with police, defendant said that Kurtz had threatened to kill him if he did not help Kurtz to kill Tia's parents. Defendant initially denied stabbing anyone, but later admitted to stabbing Tia's father at least three times. The jury found defendant guilty of first-degree murder, attempted murder, and conspiracy to commit murder. This appeal followed.

Defendant first argues that counsel was ineffective for failing to retain an expert in forensic psychiatry who was also a neurologist, and for failing to pursue an insanity defense. We disagree.

Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1 § 20. Generally, effective assistance of counsel is presumed and the defendant carries the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below objective

professional norms, and that but for counsel's ineffectiveness, the ultimate result would likely have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel has wide discretion concerning matters of trial strategy and which arguments will be presented at trial. *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011); *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Failure to call a particular witness, or present certain evidence, will constitute ineffective assistance of counsel only when the failure would deprive the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that may have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). This Court will not substitute its judgment for that of counsel on matters of trial strategy. *Payne*, 285 Mich App at 190. Nor will this Court judge counsel's competence with the advantage of hindsight. *Id.*

The trial court is not required to provide an indigent defendant with funds for an expert witness on demand. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). Instead, an expert will be provided when the indigent defendant can demonstrate "'a nexus between the facts of the case and the need for an expert.'" *Id.* at 443 (citation omitted). The defendant must also demonstrate that he cannot safely proceed to trial without the expert. *Id.* at 444.

The defense of insanity is permitted under MCL 768.21a when "as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." Insanity is an affirmative defense. MCL 768.21a(1).

Defendant argues that his history of concussions should have been explored more fully to determine the effect of his brain trauma on his actions. Counsel did file a notice of intent to claim an insanity defense and defendant was referred to the Center for Forensic Psychiatry (CFP) for a criminal responsibility evaluation. Dr. Candyce Shields performed the evaluation and determined that, based on the information she had available, an insanity defense would be unsupported.

Dr. Shields was aware of defendant's concussions, but found that defendant had an appreciation for his actions and their consequences at the time of the incident. She also determined that defendant was in control of his actions at all legally relevant times and made a number of deliberate choices and decisions. Defendant argues that Dr. Shields was not adequately qualified to determine the effect of his concussions on his actions because she was not a neurologist. To support his position that an insanity defense would have been viable because of his brain trauma, defendant submitted the affidavit of Dr. Norman Stanley Miller. Dr. Miller averred that, in his opinion, post-concussion syndrome could possibly cause an individual to lose cognitive and behavioral control and defendant may have suffered from such a syndrome.

Defendant has not made a sufficient showing of a nexus between the facts and the need for an expert to support his position that an appointed expert was necessary. *Tanner*, 469 Mich

at 443. Defendant offers no conclusive proof that he actually suffered from post-concussion syndrome or that it affected his actions at the time of the murder and assault. Additionally, defendant has not offered any evidence to prove that he could not safely proceed to trial absent an independent expert. *Id*. at 444. When evaluated, defendant denied any wrongdoing. In order to claim insanity, a defendant must admit to committing the acts of the offense; only then may it be asserted that he was legally insane at the time he committed the acts. *People v Mette*, 243 Mich App 318, 328-329; 621 NW2d 713 (2000). Because defendant could not have claimed insanity in the first instance, he cannot establish that an expert was necessary to safely proceed to trial.

In light of the foregoing, defendant cannot establish that counsel was ineffective for failing to pursue an insanity defense. Defense arguments are a matter of trial strategy and defendant has failed to demonstrate that counsel should have pursued an insanity defense in light of the CFP report. See *Strickland*, 293 Mich App at 398. The CFP found that defendant "was in control of his actions, making a number of choices and deliberate decisions surrounding the legally relevant timeframe . . . that demonstrated conscious, self-regulation." Additionally, defendant has never fully acknowledged his role in the murder and attempted murder of Tia's parents. Given the information available to counsel at the time of trial, insanity would not have been a viable defense. Counsel was not ineffective for failing to argue a meritless position. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Defendant also argues that counsel was ineffective for failing to request a duress instruction. We disagree.

"Duress is an affirmative defense 'applicable in situations where the crime committed avoids a greater harm.'" *People v Ramsdell*, 230 Mich App 386, 400-401; 585 NW2d 1 (1998), quoting *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997). It is well settled that duress is not a defense to murder. *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987); see also *Ramsdell*, 230 Mich App at 401. The reason for this rule is the premise that an individual should sacrifice his or her own life rather than take the life of a third person. *Dittis*, 157 Mich App at 41.

Defendant argues that counsel was ineffective for failing to request a duress instruction on the murder and attempted murder charges because defendant was being prosecuted as an aider and abettor. But even were we to agree in principle with defendant's argument that certain circumstances could justify relaxing the above rule, no such circumstances exist here. In the present case, defendant actively planned and participated in the murder of Tia's parents. Defendant was not merely tangentially involved in the crimes; he admitted to police during one of his interviews that he stabbed Tia's father at least three times. Defendant's assertion that being charged as an aider and abettor should have allowed for the use of a duress defense is meritless because of his active role in both the murder and attempted murder. Counsel was not required to make a futile motion. *Fonville*, 291 Mich App at 384.

Nevertheless, defendant asserts that a duress instruction would have been appropriate with respect to the attempted murder charge even if it was not applicable to the murder charge. However, the aforestated reasoning is equally appropriate when the charge is attempted murder. Duress should not be available as a defense to attempted murder, because had the attempt been

successful, the defense would not be available. A defendant should not be allowed to avail himself or herself of the duress defense simply because the attempt was unsuccessful and the victim was lucky enough to survive. See *State v Mannering*, 112 Wash App 268, 276; 48 P3d 367 (2002); see also Perkins & Boyce, Criminal Law (3d ed), p 1059. Counsel was not ineffective for failing to request a duress instruction with respect to the attempted murder charge. See *Fonville*, 291 Mich App at 384.

Finally, defendant argues that he is entitled to resentencing because the trial court did not have substantial and compelling reasons for its departure from the guidelines on his attempted murder conviction. Again, we disagree. Defendant was sentenced to life imprisonment without parole for his first-degree murder conviction. It is true that the statutory guidelines prescribed a minimum sentence for the attempted murder conviction of 135 to 225 months. However, this issue is moot in light of defendant's mandatory sentence of life without parole on the first-degree murder conviction. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995); *People v Passeno*, 195 Mich App 91, 102; 489 NW2d 152 (1992), overruled in part on other grounds by *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood