

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 26, 2014

v

JAMES ED TRAXLER, JR.,

Defendant-Appellant.

No. 314951
Newaygo Circuit Court
LC No. 11-010018-FC

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 20-80 years imprisonment for the murder conviction and to a consecutive term of two years imprisonment for the felony firearm conviction. We affirm.

I. FACTS

At trial, it was undisputed that defendant shot his neighbor. In early June 2011 defendant went to the victim's house to help repair a lawnmower. The two drank several beers and had an argument, resulting in the victim throwing defendant to the ground and knocking defendant unconscious. Afterward, defendant testified he had trouble sleeping and experienced a lot of pain. On June 25, 2011, defendant approached the victim while the victim was mowing his grass on a riding lawnmower. Defendant asked the victim to pay medical bills associated with the prior incident. The victim refused, and defendant says the victim lunged to grab defendant's arm. Defendant then shot the victim in the head. At trial, defendant's theory of the case was that he was suffering from Post-traumatic Stress Disorder (PTSD) at the time of the shooting. Defendant claims his PTSD began after serving in the Vietnam War and the early June 2011 altercation with the victim triggered the condition. Both parties offered expert witnesses to testify as to defendant's mental state at the time of the crime.

II. MRE 702

Defendant argues the prosecution's expert testimony was inadmissible under MRE 702. Defendant failed to object to the testimony. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MRE 702:

If the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

“The trial court has an obligation under MRE 702 ‘to ensure that any expert testimony admitted at trial is reliable.’” *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007) (citation omitted). “Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data.” *Id.*

Defendant argues the expert based her testimony on unreliable data and was thus inadmissible. We will address each of the three reasons defendant claims the data was unreliable. First, defendant claims Gilbert based her opinion on unreliable data because she did not allow defendant to complete a MMPI-2 personality test and omitted this fact from her report. Gilbert testified the MMPI-2 has a limited use for forensic purposes because it cannot discern a person’s mental state at the time of an offense. The expert further testified she did not need defendant to finish the test to form her opinion, and the omission was nothing more than an error.

Second, defendant claims Gilbert did not have any of defendant’s medical records or jail records, and thus had incomplete information. However, the expert testified she received and reviewed these records after she interviewed defendant.

Third, defendant claims Gilbert only referenced 3 of the 27 mental health reports prepared by a counselor. While true, defendant does not cite to anything in the record nor does he explain how the failure to consider the reports rendered the expert’s opinion insufficiently supported by facts and data. Defendant bears the “burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal [is] predicated.” *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Moreover, to the extent the expert’s evaluation was incomplete, “[t]he arguments of defendant go to the weight of the [expert] testimony, not to its admissibility.” *People v Collins*, 43 Mich App 259, 265; 204 NW2d 290 (1972).

Furthermore, the expert testified she considered many sources of information in forming her opinions: police reports, jail records, hospital records, handwritten witness observations, the 911 call, the observations of the doctor who treated defendant within an hour of the crime, the observations of the jail staff who assessed defendant when he was incarcerated the day of the crime, three reports produced by a counselor who counseled defendant while he was in jail, and her interview with defendant. Based upon this information, we conclude the expert’s testimony was based on sufficient facts and data. See *Mulholland v DEC Intern Corp*, 432 Mich 395, 414; 443 NW2d 340 (1989).

Defendant also argues that, in violation of MRE 702, the expert's testimony was not "the product of reliable principles and methods," and the expert did not apply the "principles and methods reliably to the facts of the case." Defendant fails to brief or explain how the expert's principles and methods were unreliable, fails to brief or explain how the expert applied the principles and methods unreliably to the facts, and fails to cite to anything in the record supporting his argument. Rather, he argues because the expert used insufficient facts and data to form the basis of her opinion, her opinion was not the product of reliable principles and methods and those principles and methods were not applied reliably to the facts. As discussed, the expert relied on sufficient facts and data. Any deficiency went to weight, not admissibility. *Collins*, 43 Mich App at 265. Defendant has not established plain error related to the admission of the testimony under MRE 702. *Carines*, 460 Mich at 763.

III. MRE 403

Defendant further argues the testimony was inadmissible under MRE 403, which provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Here, the expert's testimony on defendant's state of mind at the time he committed the crime was not only relevant but also highly probative to refute defendant's theory of the case that he was suffering from PTSD at the time of the crime. *People v Mardlin*, 487 Mich 609, 624; 790 NW2d 607 (2010). Nothing in the record indicates the jury gave the expert's testimony "undue or preemptive weight," *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998), or the evidence injected "considerations extraneous to the merits of the lawsuit," *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). Further, the trial court instructed the jury, "you do not have to believe an expert's opinion. Instead, you should decide whether you believe it and how important you think it is." "Jurors are presumed to follow their instructions." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). On this record, defendant has not established plain error related to MRE 403. *Carines*, 460 Mich at 763.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues trial counsel was ineffective for failing to object to Gilbert's testimony. However, because the testimony was admissible under MRE 702 and properly not excluded under MRE 403, trial counsel was not objectively unreasonable for failing to object. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck