STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK DEMPSEY BOLTON,

Defendant-Appellant.

UNPUBLISHED
February 20, 1998

No. 192044
Antrim Circuit Court
95-002950-FC

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on two counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), two counts of felony-firearm, MCL 750.227b; MSA424(2), and one count of assault with a dangerous weapon, MCL 750.82; MSA 28.277. The trial court vacated defendant's convictions for first-degree felony murder. It sentenced defendant to life imprisonment for the remaining first-degree murder conviction, two years' imprisonment for each felony-firearm conviction, and thirty-two to forty-eight months' imprisonment for the assault with a dangerous weapon conviction. Defendant appeals as of right. We affirm.

Sometime during the evening hours of February 12, 1995, defendant strangled Kenneth Gribi and his wife Mildred Gribi. The victims were found by police officers inside their home with nylon stockings tied around their necks. All of defendant's convictions stem from the circumstances surrounding these killings. Defendant presented an insanity defense at trial. Defendant's expert testified that defendant suffered from a mental illness, schizophrenia, and mental retardation. The expert opined that defendant was legally insane because while he was able to appreciate the wrongfulness of his conduct, he was not able to conform his conduct to the requirements of the law.

I

Defendant first argues that his constitutionally protected rights of due process and equal protection were violated when, due to an alleged fee dispute between defendant's expert psychiatric witness and the trial court, defendant was not given a standardized IQ test. Defendant asserts that the

failure to conduct such a test undermined his insanity defense. Initially, we note that because there is no indication in the record that this issue was raised before the trial court, the issue has not been preserved for appeal. We decline to consider this unpreserved issue because we find that the alleged error was not decisive to the outcome of the case. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996).

In order to establish the affirmative defense of insanity, a defendant must prove that he or she was legally insane at the time the crime was committed. MCL 768.21a; MSA 28.1044(1). According to MCL 768.21a(1); MSA 28.1044(1)(1):

> An individual is legally insane if, as a result of mental illness . . . , or as a result of being mentally retarded as defined in section 500(h) of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, 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.

At the time of trial, MCL 330.1500(h); MSA 14.800(500)(h) provided: "'Mentally retarded' means significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior."[1]

Although there was no standardized IQ test administered to defendant, there was evidence at trial that defendant's IQ was below average. Defendant's expert witness estimated defendant's IQ to be seventy. This was consistent with expert testimony offered by the prosecution that defendant's IQ was somewhere between seventy and eighty. However, defendant failed to present any evidence that his alleged retardation had its onset "during the developmental period" or that the alleged retardation was "associated with impairment in adaptive behavior." Therefore, even if defendant had been administered an IQ test and that test had established that defendant's general intellectual function was significantly subaverage, the failure to establish the other two prongs of the statutory test undermined the mental retardation aspect of his insanity defense. Further, while defendant's expert diagnosed him as being mentally retarded, the real thrust of the expert's testimony was that defendant was mentally ill based on the diagnosis of schizophrenia, and that due to the schizophrenia defendant was unable to distinguish reality from delusion and therefore unable to conform his conduct to the requirements of the law. Accordingly, the failure to perform a standardized IQ test was not decisive to the outcome of the case.

Defendant also argues that defense counsel's failure to either arrange for the IQ test or argue that the alleged fee dispute was prejudicing his case evidences ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the defendant "must show that counsel's performance was below an objective standard of reasonableness under prevailing norms. . . . [and] that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

We note that defendant fails to show how the alleged fee dispute impacted the administration of an IQ test. There is no evidence in the record that the decision regarding the administration of the test was related to the discussion regarding the expert's fees at the time of trial. In fact, it is not unlikely that because defendant's IQ was estimated by the expert to fall so close to the threshold of 70, counsel made a strategic decision to rely on the estimate rather than risk a test result above 70. Moreover, because we have already concluded that the failure to administer an IQ test was inconsequential given the lack of proof on the other two elements of statutory mental retardation, counsel's failure to arrange for such a test was not prejudicial. Because defendant has not established the requisite prejudice, his claim of ineffective assistance of counsel must fail.

II

Defendant argues that one of the prosecution's psychiatric rebuttal witnesses improperly vouched for her credibility during direct examination. Defendant failed to object to the testimony he challenges on appeal. Accordingly, this Court will reverse defendant's convictions on this basis "only if presented with a manifest and serious error resulting in fundamental injustice." *People v Federico*, 146 Mich App 776, 796; 381 NW2d 819 (1985). We find no such error in this case.

The rebuttal witness in question was at the time of trial director of research and training at the Michigan Center for Forensic Psychiatry (a division of the Michigan Department of Mental Health). We find that in the context in which they were made, the challenged comments do not amount to improper vouching. Instead, it appears that the prosecution was trying to establish that the evaluative procedures followed by the Michigan Center for Forensic Psychiatry were impartial and that the staff is not predisposed to find a defendant is malingering. The prosecution's questions on this issue were responsive to defense counsel's implication on voir dire that, because she worked for the center, the witness was predisposed to testify favorably for the state.

As with his first issue, defendant argues that defense counsel's failure to object to the challenged testimony amounted to ineffective assistance. Because we find that the testimony cited cannot be characterized as improper vouching, counsel's failure to object to it cannot be considered ineffective assistance.

III

Finally, defendant argues he was denied due process because some of the jurors saw him in handcuffs as he was being transported from the jail to the courthouse.[2] "Defendant has a fundamental right to a fair trial secured by the Fourteenth Amendment." *People v Turner*, 144 Mich App 107, 108; 373 NW2d 255 (1985). In this case, some members of the jury did see defendant in handcuffs as he was being transported to the courthouse. When informed of the problem, the trial judge immediately instructed the jurors that the restraints were irrelevant to the question of defendant's guilt, noting that the fact that defendant was wearing handcuffs "simply doesn't have anything to do with anything." We find that the judge's cautionary instruction was sufficient to eliminate any possible prejudice resulting from the chance viewing. Accordingly, the fact that the jurors saw defendant in handcuffs did not deny him a fair trial.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White

[1] Effective March 28, 1996, the definition of mentally retarded is no longer contained within MCL 333.1500; MSA 14.800(500). However, the same definition appears in MCL 330.2001a(6); MSA 14.800(1001a)(6).

[2] In his statement of questions presented, defendant includes a reference to jurors seeing him in jail garb in addition to handcuffs. However, we decline to address this issue because defendant does not discuss it in his argument.