

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

April 12, 2005

No. 253123

Wayne Circuit Court

LC No. 03-008620-01

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, and to two years in prison for the felony-firearm conviction. We affirm.

First, defendant argues that the trial court erred in admitting the victim's hearsay statements regarding previous threats by defendant's brother, and the error requires reversal because it was outcome determinative. We disagree. This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An evidentiary error does not merit reversal unless, after an examination of the entire cause, it affirmatively appears more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Before trial, the prosecutor moved to admit the victim's statements arguing they were relevant to show the victim's state of mind under MRE 803(3) and defendant's motive for the killing. The trial court agreed with the prosecutor and granted the motion. Even if erroneously admitted, Washington's and Tranika's brief testimony concerning the brother's threats against victim was not outcome determinative. *Id.* The evidence against defendant was strong. The victim's mother identified defendant as the shooter she saw from approximately eight feet away in a well-lit area. The victim's friend, who saw the shooter come over the fence, immediately ran to the local police department and gave the police a description of the shooter that matched defendant. Sergeant Decker, one of the first officers at the scene, followed fresh footprints in the snow and found two witnesses who had just given the shooter a ride. Their description of the shooter also matched defendant's description. They further testified that the man had a revolver and kept stating that he had to "flick" or shoot someone. In light of the strong evidence of defendant's guilt, any error was not outcome determinative.

Defendant next contends that the trial court deprived defendant of his right to present a defense by excluding defendant's medical records related to his 1996 injury. Specifically, defendant contends that his 1996 medical records were admissible because they were highly relevant to show he was physically incapable of climbing over a six-foot six-inch fence at the scene. We disagree. This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *Katt, supra*, p 278. However, this Court reviews de novo the constitutional question whether defendant was denied his right to present a defense. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999); *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984).

"It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). This includes evidentiary rules on relevance. Generally, all relevant evidence is admissible; however, 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. MRE 402; MRE 403.

In this case, the prosecution moved in limine to deny the admission of defendant's medical records from September 1996 on the basis of relevancy. In response, defense counsel argued that defendant's 1996 medical records were relevant to compare with Dr. Gary Weekes' reports and to show whether defendant had the physical strength to jump over the six-foot six-inch fence. The trial court delayed its ruling on admission of defendant's medical records. However, after finding that Dr. Weekes did not consider defendant's prior medical records in making his diagnosis of defendant, the trial court denied the admission of defendant's 1996 medical records on the basis of relevance. After review of Dr. Weekes' testimony, we agree with the trial court's ruling. Dr. Weekes testified that there was no need to look at defendant's prior medical records for his diagnosis because defendant was able to function normally in the jail. Thus, the probative value of the evidence, to show defendant's physical ability at the time of the murder, was minimal at best. Defendant also did not show how his 1996 medical records were relevant to his physical ability to shoot at the time of the murder in 2003. In addition, the evidence showed that the shooter did not jump over the fence, but rather used the cinder block at the bottom of the fence and the base of a basketball hoop to get over the fence. Accordingly, the trial court did not abuse its discretion in excluding the 1996 medical records on the basis of relevancy.

Moreover, the exclusion of the 1996 medical records did not deprive defendant of his right to present a defense concerning his physical limitations. As part of his defense, defendant presented the testimony of Dr. Weekes, who noted in his report that defendant had multiple gunshot wounds to his head and various parts of his body and as a result of the previous head injury, defendant suffered from weakness in his right arm and right leg, and was unable to use his right hand. Dr. Weekes' report was admitted into evidence. Also, defendant's godfather, Ernest Turmon, testified that defendant had been unable to use his right arm and that defendant had walked with a limp in his right leg because of his previous injury. Moreover, defendant testified that his injury prevented him from jumping over a six-foot six-inch fence or holding anything in his right hand. Defendant also showed the jury his leg brace, gunshot wounds, and

his limited range of motion. Thus, the record shows that defendant was able to present, through his own testimony and the testimony of Dr. Weekes and Turmon, his theory that he had no physical strength to jump over the six-foot six-inch fence and commit the offense. Accordingly, we hold that he was not prohibited from presenting a defense.

Finally, defendant argues that his counsel was ineffective in failing to call his treating doctors and therapists to support the defense theory that defendant was unable to have committed the offense due to his physical limitations. Also, defendant argues that his counsel was ineffective in failing to move before trial to admit defendant's 1996 medical records. We disagree. To fully preserve a claim of ineffective assistance of counsel, a defendant should move for a new trial or evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Because defendant did not move for a new trial or a *Ginther*<sup>1</sup> hearing, defendant failed to preserve this issue, and this Court's review is limited to the mistakes apparent on the record. *Id.* at 658-659. In reviewing a claim of ineffective assistance of counsel, a trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise." *Id.*, citing *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1997).

Decisions regarding whether to call witnesses are presumed to be trial strategy, and the failure to call a witness only amounts to ineffective assistance of counsel if the defendant is deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, as previously discussed, defendant was able to present, through his own testimony and the testimony of Dr. Weekes and Turmon, his defense that he was unable to jump over the six-foot six-inch fence and commit the offense. Moreover, defendant has failed to provide evidence that the testimony of the treating doctors or physical therapists would have supported his defense and, thus, has failed to establish the factual predicate of his claim. See *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004). Accordingly, defendant has failed to show that counsel's decision not to call defendant's treating doctors and physical therapists deprived him of a substantial defense. *Id.*

Similarly, counsel's decision not to move before trial to admit defendant's 1996 medical records and his decision to seek their admission during a trial for a limited purpose was a matter of trial strategy that this Court will not second-guess. *Dixon, supra*, p 398. Given the substantial evidence against defendant, he has failed to show that the outcome would have been different but

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

for the alleged absence of such records. *Id.* Therefore, we hold that defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens