

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

JEROME COREY PAHOSKI,
Defendant-Appellant.

No. 305230
Wayne Circuit Court
LC No. 06-004634

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals an order of the circuit court denying his motion for a new trial based on newly discovered evidence. We affirm.

This case comes before this Court following a second remand to determine whether neurological testing supported defendant's insanity defense. In *People v Pahoski*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2008 (Docket No. 272906) (*Pahoski I*), we concluded that the trial court abused its discretion when it denied defendant's motion for an adjournment to allow time for a neurological examination. We remanded for completion of the appropriate testing and instructed the trial court as follows:

If the trial court finds that the test results support Dr. [Steven] Miller's¹ tentative insanity theory, then a new trial is warranted. Otherwise, the trial court's original ruling was valid, as are defendant's convictions and sentences. The trial court should make findings of fact and conclusions of law sufficient to enable meaningful review. [*Id.* at p 5.]

During the first remand, the trial court held an evidentiary hearing, but it did not afford defendant the opportunity for neurological testing. *People v Pahoski*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2010 (Docket No. 289991) (*Pahoski II*). Defendant appealed, and we remanded the case to the trial court "to afford defendant the

¹ A psychologist.

opportunity for neurological testing and for an evidentiary hearing, in accord with *Pahoski I.*” *Id.* at p 3.

On second remand, the appropriate testing was performed, following which Dr. Miller concluded that defendant did not meet the criteria for being considered legally insane. However, Miller noted that there was a finding of mental illness. Therefore, he opined that an adjudication of guilty but mentally ill could be appropriate. Thereafter, defendant filed a motion for a new trial based on newly discovered evidence. Defendant conceded that an insanity defense would be problematic in light of Miller’s findings, but argued that a different verdict was probable based on the finding of mental illness. Specifically, defendant stated that “any competent attorney should be able to take this evidence and argue forcefully for a verdict of not guilty based on Self Defense, or Manslaughter, or due to lack of premeditation, Second Degree murder.”

After hearing arguments, the trial court issued a written order affirming defendant’s convictions. The trial court first concluded that it had complied with our remand order. The court stated that neurological testing was performed, and it did not support defendant’s insanity defense. The court then addressed defendant’s motion for a new trial. The court concluded that the test results were not newly discovered evidence. Further, the court concluded that defendant could not “show that the alleged new evidence would make a different result probable on retrial.” Therefore, it denied defendant’s motion for a new trial. Defendant now appeals, arguing that the trial court erred when it denied his motion for a new trial.

Whether to grant new trial is in the trial court’s discretion, and its decision is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). “An abuse of discretion occurs only ‘when the trial court chooses an outcome falling outside [the] principled range of outcomes.’” *Id.*, quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). To show that defendant is entitled to a new trial based on newly discovered evidence, defendant must demonstrate that “(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.” *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotation marks and citation omitted).

Defendant does not meet the criteria for granting a new trial based on newly discovered evidence. Though defendant’s specific diagnoses were not known prior to trial, defendant’s mental health issues were known and documented. In *Pahoski II* at p 2, we noted that “[s]everal facts supported defendant’s insanity defense.”

Family reported a head injury, two jail psychiatrists thought defendant was psychotic or schizophrenic, defendant was receiving psychiatric medicines in jail, and defendant said he had heard voices since childhood. Dr. Miller thought a head injury plus a traumatic event (i.e., killing two people) could have caused a memory loss. Childhood trauma could lead a person to deal with anxiety by splitting it off, and this could present as memory problems. If defendant could not remember the killings because of a mental disease or defect, Dr. Miller would have been more convinced that he was mentally ill. . . . [*Id.*]

Therefore, the neurological test results can hardly be considered “newly discovered evidence.” At most, they confirmed what was already suspected—that defendant was suffering from underlying mental illness. The trial court noted as much in its opinion: “It is important to emphasize that the alleged ‘newly discovered evidence’ is the report of the neurological expert, whose primary function was to assist and supplement the report of the independent psychiatric expert who did the pre-trial evaluation of the defendant.”

Additionally, defendant cannot show that this evidence makes a different result probable on retrial. Defendant argues that he was denied his right to present evidence that he was guilty but mentally ill of the lesser included offenses of second-degree murder or manslaughter. Thus, defendant is arguing that he could have used the evidence of mental illness to negate the specific intent required for first-degree murder. This argument is unpersuasive. In *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001) our Supreme Court addressed a similar issue and concluded that evidence of mental illness, short of legal insanity, cannot be used to negate specific intent:

[T]he Legislature has created an all or nothing insanity defense. Central to our holding is the fact that the Legislature has already contemplated and addressed situations involving persons who are mentally ill or retarded yet not legally insane. As noted above, such a person may be found “guilty but mentally ill” and must be sentenced in the same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment. MCL 768.36(3). Through this statutory provision, the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent.

Carpenter makes it clear that evidence of mental illness, short of legal insanity, is inadmissible to negate the element of specific intent. Therefore, contrary to defendant’s argument, he was not denied his right to present evidence that he was guilty of a lesser included offense. “[T]he insanity defense as established by the Legislature is the sole standard for determining criminal responsibility as it relates to mental illness or retardation.” *Id.* at 241. Consequently, evidence that defendant is suffering from mental illness, short of insanity, “cannot be used to avoid or reduce criminal responsibility by negating specific intent.” *Id.* at 237.

Defendant also argued that he was denied his right to present evidence that he was guilty but mentally ill. Defendant failed to raise this argument in his motion for a new trial; therefore, it is unpreserved and reviewed for plain error. See *People v Carines*, 460 Mich 750, 762-763; 5997 NW2d 130 (1999). A defendant trying to sustain a plain error challenge must show the following: (1) an error occurred; (2) the error is obvious; and (3) the obvious error affected defendant’s substantial rights. *Id.* at 763. “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.*

In *People v Lloyd*, 459 Mich 433, 45450-451; 590 NW2d 738 (1999), our Supreme Court addressed a similar argument in the context of ineffective assistance counsel and concluded that the failure to obtain a verdict of guilty but mentally does not constitute prejudice to a defendant:

The Court of Appeals said that, “had counsel obtained defendant’s mental health records, given them to O’Reilly, informed O’Reilly of the legal definitions of insanity and mental illness, cross-examined the prosecution’s expert witness regarding the findings of mental health workers who believed that defendant was insane, subpoenaed the mental health workers that had previously evaluated defendant, and requested that the trial court, as required by MCL 768.29a; MSA 28.1052(1), give the appropriate jury instructions prior to the experts’ testimony and again at the conclusion of trial, the jury may well have returned a verdict of guilty but mentally ill.” *However, it must be recalled that a person found guilty of first-degree murder, but mentally ill, still must serve life in prison. Thus, failure to obtain such a verdict would scarcely constitute prejudice to the defendant.* [Footnote omitted and emphasis added.]

As was the case in *Lloyd*, defendant cannot establish prejudice.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder