

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 26, 2013

v

DONALD EDWARD NORWOOD, JR.,

Defendant-Appellant.

No. 310300
Allegan Circuit Court
LC No. 11-017317-FH

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

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and domestic assault, second offense, MCL 750.81(3). He appeals as of right. We affirm.

The victim and defendant, who eventually became her boyfriend and fiancé, met in February 2010 and had a good relationship, but starting in January 2011, defendant became violent and aggressive and was verbally, mentally, and physically abusive toward the victim. She lived with defendant, his parents and sister beginning in July 2011. On July 11, 2011, John Heath, a friend of the family, drove defendant home from work about midnight. Heath remained in the home with defendant's parents, in the living room, until about 3:30 a.m. The victim testified she woke up about 2:00 a.m. and defendant was having sexual intercourse with her. She tried to get off the bed and told him to stop. He put his hand over her mouth and told her to be quiet and let him finish. The victim went to a friend's home the next morning and called the police for help removing her property from defendant's home. When Deputy Terry Vandenberg arrived, the victim told him about the assault. Deputy Vandenberg spoke with defendant, who denied any physical assault and indicated that the victim was "very dumb," "crazy in the head," and "a pain in his ass." Defendant admitted to Detective Chris Haverdink that he had sexual relations with the victim in the early morning hours of July 12, 2011, but he claimed that it was consensual. Defendant also told Detective Haverdink that he and the victim had sexual relations the previous three consecutive nights.

Heath, defendant's parents, and defendant's sister all indicated that they were in the home at the time of the incident and did not see or hear anything unusual. Defendant denied having sexual relations with the victim in the early morning hours of July 12, 2011. He claimed he had engaged in sexual relations with the victim only three times during their relationship. He also

denied having sexual relations with the victim three consecutive nights or telling Detective Haverdink that he did.

Before trial, the trial court granted prosecutor's motion in limine excluding evidence of the victim's mental illness and medications. The victim testified outside the presence of the jury that she had been diagnosed with schizo-effective disorder, which she understood was "between schizophrenia and manic depressive disorder." As of July 2011, she took two 300 milligram tablets of ceraquil and 2 milligrams of respidol before bed, as directed. She said that the medications calmed her down and made her drowsy so she could sleep, but that she did not have trouble waking up in the night. She testified that her perceptions were not impaired because of her medications or her mental illness, and that her memory had never been affected by the medications. The trial court granted the motion in limine, but allowed defendant 24 hours to make an offer based on sound information specific to this particular victim that testimony of her mental illness and medication was relevant. Defendant made no offer of proof.

On appeal, defendant argues he was denied his constitutional right to present a defense because the trial court erred in excluding the evidence of the victim's mental illness and medications. Defendant raised and preserved the underlying issue of presenting evidence of the victim's mental illness and medications. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant did not present this evidentiary issue as a constitutional claim in the trial court, however, and this claim on appeal is not preserved. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). Evidentiary decisions are reviewed for a clear abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005) (citation omitted). There is an abuse of discretion "only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision." *Id.* (citation omitted). Whether a defendant was denied the constitutional right to present a defense is reviewed de novo. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). This unpreserved error is reviewed for plain error affecting substantial rights. *King*, 297 Mich App at 472. To show there was plain error, defendant must establish that error occurred, the error was plain, and that the error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"A defendant has a constitutionally guaranteed right to present a defense[.]" *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). However, the right to present a defense "is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 379 (quotation omitted). The right to present a defense "extends only to relevant and admissible evidence." *People v Likine*, 288 Mich App 648, 658; 794 NW2d 85 (2010), rev'd on other grounds 492 Mich 367 (2012) (citation omitted). "Michigan's Rules of Evidence do not infringe a defendant's constitutional right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve." *King*, slip op at 4 (quotation and internal quotation omitted.)

MRE 402 states that "[a]ll relevant evidence is admissible," except as otherwise provided. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCR 401. "Relevant evidence thus is

evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence).” *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888, 896 (2000).

In this case, defendant argues that evidence of the victim’s mental illness and medications was relevant to explain why she would make up the story that she and defendant had engaged in nonconsensual sex and that it would assist the trier of fact in determining her credibility. While credibility of a witness is always relevant, *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995), nothing in the record supports that the victim’s mental illness or medications reflected on her credibility. In the absence of any evidence or indication that the victim’s mental illness or medication had “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence[.]” the trial court did not abuse its discretion when it excluded the evidence. MRE 401; MRE 402; *Bauder*, 269 Mich App at 179.

Even if excluding the evidence of the victim’s mental illness and medications was error, this preserved error does not require reversal unless, “after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (internal quotation omitted). When considering whether an error was outcome determinative, “the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence.” *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000) (citation omitted). Defendant has the burden of showing that the alleged error was outcome determinative. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). In this case, the victim was consistent in her account of the events. In contrast, defendant’s testimony at trial contradicted his earlier statements to the police, and there was inconsistency in the testimony provided by the defense witnesses. On this record, in the face of the victim’s consistent testimony and noting that her mental illness was controlled, defendant has not demonstrated that if the evidence was excluded in error, the error was outcome determinative. *Lukity*, 460 Mich at 496; *Elston*, 462 Mich at 766.

Defendant additionally argues that the evidence was relevant to show why defendant stated to Deputy Vandenberg that the victim was “crazy in the head.” However, using the victim’s mental illness and medications to explain defendant’s statement does not have “any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable,” so it is irrelevant. MRE 402. Further, when defendant testified, he denied stating the victim was “crazy in the head” and clarified that he actually stated the victim “acts like she’s crazy in the head.” Defendant’s own distinction that his comment concerned the victim’s conduct and not her mental health, further renders evidence of the victim’s mental health and medications irrelevant, even in regard to defendant’s own statement.

In reaching our conclusion, we note that defendant makes no argument that any of the rules of evidence used to bar the evidence of the victim’s mental illness or medication infringed on his constitutional right to present a defense by being “arbitrary” or “disproportionate to the purposes they are designed to serve.” *King*, 297 Mich App at 474 (quotation omitted). Defendant’s failure to argue the merits of his assertion of error regarding his constitutional claim

constitutes abandonment of this issue. *Id.* Additionally, even if defendant did argue the merits, for the foregoing reasons stated in this opinion, we would still affirm the conviction.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause