

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JAMES AIELLO,

Defendant-Appellant.

UNPUBLISHED

May 21, 2009

No. 283241

St. Clair Circuit Court

LC No. 07-000818-FC

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a, armed robbery, MCL 750.529, receiving and concealing a stolen firearm, MCL 750.535b, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carrying a dangerous weapon with unlawful intent, MCL 750.226, assault with intent to do great bodily harm, MCL 750.84, two counts of discharge of a firearm at a dwelling, MCL 750.234b, and discharge of a firearm from a motor vehicle, MCL 750.234a. The trial court sentenced defendant to 12 to 50 years' imprisonment for the carjacking conviction, 12 to 50 years' imprisonment for the armed robbery conviction, two to ten years' imprisonment for the receiving and concealing a stolen firearm conviction, two years' imprisonment for each of the felony-firearm convictions, three to five years' imprisonment for the carrying a dangerous weapon with unlawful intent conviction, six to ten years' imprisonment for the assault with intent to do great bodily harm conviction, two to four years' imprisonment for each of the discharge of a firearm at a dwelling convictions, and two to four years' imprisonment for the discharge of a firearm from a motor vehicle conviction. Because defendant's ineffective assistance of counsel claims as well as his erroneous admission of evidence claims are without merit, we affirm.

Defendant argues that his counsel's failure to investigate and pursue an insanity defense denied him the effective assistance of counsel. Defendant specifically asserts that his counsel's failure to investigate this substantial defense constituted a deficient performance that prejudiced defendant and that no trial strategy can justify this failure. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People*

v Ginther, 390 Mich 436; 212 NW2d 922 (1973), this Court’s review is limited to mistakes apparent on the record. *People v Riley, (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). “Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise.” *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). “To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “Defendant must overcome the strong presumption that counsel’s performance was sound trial strategy.” *Dixon, supra* at 396.

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present that defense and that the defense was substantial. *Id.* A trial counsel’s failure to investigate and present a meritorious insanity defense constitutes a denial of the effective assistance of counsel. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). Insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law. MCL 768.21a(1); *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001).

In this case, defendant was hospitalized for about four days for recurring depression after he attempted to commit suicide by taking approximately 80 aspirin pills. This occurred about six weeks before his crimes took place. Defendant was prescribed two anti-depressant medications as a result of his attempted suicide, but his prognosis was guarded because the treating psychiatrist did not believe defendant would handle his depression well. However, even with this hospitalization, defendant presents no evidence showing that he failed to appreciate the nature and quality of the wrongfulness of his conduct or that he lacked the capacity to conform his conduct to the law. Additionally, the record evidence showed that defendant’s conduct was purposeful. Defendant was previously upset with Brianna Frantz and her family. Defendant threatened to kill Frantz and her family after she refused to work things out in their relationship. Defendant obtained a gun, stole a taxicab, and then shot at Frantz’s house. He then discarded the gun and cab and went to a friend’s house. Shortly thereafter, defendant then fled the state. Based on these facts, defendant did not lack the capacity to conform his conduct to the law because he came up with a detailed plan and then executed that plan. Without a basis for concluding that insanity was a substantial defense, defendant’s claim of ineffective assistance of counsel premised on this ground must fail because counsel is not ineffective for failing to pursue a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Also, defendant's argument that defense counsel's decision to call Dr. Mohammed Saeed was more of a help to the prosecution is misplaced because Saeed's testimony opened up at least the very minute possibility that the medication defendant was prescribed could cause homicidal ideation in support of the defense theory of voluntary intoxication. Regardless, the decision to call or question witnesses is presumed to be a matter of trial strategy. *Dixon, supra* at 398. This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Therefore, defendant has failed to show that defense counsel was ineffective.

Defendant also requests the alternative relief of remand for further fact-finding on this issue, but he did not comply with MCR 7.211 that provides the procedure for requesting a hearing in the trial court to develop evidence. Even on appeal, defendant has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Therefore, we decline to order a remand.

Defendant raises additional issues in his Standard 4 brief. First, he argues that he was denied a fair trial by the trial court's admission of a recording on a CD. The CD recording was of a conversation between defendant and Frantz that was initially recorded by the cell phone of Rachel Herr, Frantz's friend, and then re-recorded on to a CD. Defendant contends that the trial court erred when it allowed this conversation to be played for the jury because the recording was so inaudible and incomprehensible that it was untrustworthy and its admission was error requiring reversal. To properly preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that is being asserted on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). At trial defense counsel objected to the admission of the recording on the ground that a copy of the recording violated the best evidence rule. On appeal, defendant argues that the trial court improperly admitted the recording because the trial court failed to listen to the recording outside of the jury's presence and determine whether the recording was sufficiently comprehensible for the jury to consider its contents. The ground for objection at trial is not the same ground defendant is asserting on appeal. Therefore, the issue is not preserved. Because the issue is not preserved, this Court's review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

Under MRE 901, the foundation for the admission of evidence may be established by "evidence sufficient to support a finding that the matter in question is what its proponent claims." *People v Berkey*, 437 Mich 40, 48; 467 NW2d 6 (1991). The fact that a recording may not reproduce an entire conversation, or may be indistinct or inaudible in part, has usually been held not to require its exclusion. *People v Frison*, 25 Mich App 146, 148; 181 NW2d 75 (1970). This Court stated in *People v Karmey*, 86 Mich App 626, 632; 273 NW2d 503 (1978), quoting 29 AmJur2d, Evidence, § 436, p 495:

The fact that a recording may not reproduce an entire conversation, or may be indistinct or inaudible in part, has usually been held not to require its exclusion; however, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said. It has been held that unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge.

In this case, Herr's cell phone was used to record a conversation between defendant and Frantz. This recording was transferred onto a CD. As written in the trial transcript, the recording was as follows:

VOICE: Could you – no – scared about you...(inaudible)...going right – what you...(inaudible)...swear to God. Bullets and...(inaudible).

Herr testified that the recording on the CD was what was recorded on her cell phone. Also, both defendant and Frantz testified and were cross-examined on what was said during that conversation. Their testimony indicated that defendant threatened to kill Frantz and her family during the recorded conversation and their testimony did not contradict what was heard on the recording. Also, although Herr admitted that the recording was difficult to hear, the recording was not so inaudible and indistinct that the jury had to speculate regarding what was said. Because of the foundation provided Herr and the additional context provided by the testimony of defendant and Frantz, there was no error in the admission of the recording.

Finally, defendant argues that he was denied the effective assistance of counsel by his counsel's failure to object to the form of the verdict, which excluded the lesser option to carjacking of unlawfully driving away an automobile (UDAA). Because there was no *Ginther* hearing, this Court's review is limited to mistakes apparent on the record. *Riley, supra* at 139. Again, "[t]o establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Scott, supra* at 526, quoting *Effinger, supra* at 69.

During a discussion of the jury instructions defense counsel stated that:

My only point, and I'll be brief, is the fact that with regard to the carjacking there was some authority that unlawful driving away of an automobile has been used in the past as a necessarily included lesser offense. I know that the People made the point that a rational view of the evidence would support the reading of that instruction. I ask that it be read. I would ask at this point that if the Court – the point I would make, that if the Court is not going to read it, I would object to the Court not reading the instruction.

The trial court responded by stating:

All right. And I did agree with the Prosecution on the facts and evidence as presented in this case that that [sic] as a cognate or lesser included offense would not fit, and therefore, we'd decline to give that instruction.

After the trial court instructed the jury, the following exchange took place:

Trial Court: All right. Now we'll let the record reflect that the jury is sequestered in the jury room, both counsel have now heard the instructions as given by the Court. And if there's – of course, anything that was said earlier is incorporated by reference, but if there's any further questions or remarks or

statements about those instructions either party wish to make, they may do so at this time.

The Prosecutor: The People are satisfied with the instructions. The verdict form, Mr. Boucher [defense counsel] and I discussed it, it needs to be corrected. The Count 1 did not – was—the UDAA was supposed to be removed. The less serious –

Trial Court: Okay. You agree with that?

Defense Counsel: I do, Judge.

Trial Court: Okay

The Prosecutor: I'll get that done right now.

Defendant has misinterpreted the record in arguing that his counsel was ineffective for initially objecting to the exclusion of the UDAA instruction and then acquiescing to the amended form of the verdict. Defense counsel clearly placed an objection on the record regarding the trial court's decision not to give the UDAA instruction. This objection was even incorporated by reference into the discussion after the trial court instructed the jury. Defense counsel's agreement that the form of the verdict should not include UDAA was because the trial court had already refused to give this instruction. Defense counsel only agreed to an accurate form of the verdict based on the trial court's ruling. There would have been no merit to defendant's objection to the form of the verdict and counsel is not ineffective for failing to argue a meritless position. *Snider, supra* at 425.

Defendant requests the alternative relief of remand for further fact-finding on this issue as well. However, defendant has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Therefore, we decline to order a remand.

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio