

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KENTISH KESTON ST. ANGE, a/k/a KENTISH
ST. ANGE,

Defendant-Appellant.

UNPUBLISHED

January 10, 2013

No. 304561

Calhoun Circuit Court

LC No. 2010-001269-FC

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316. He was sentenced to life imprisonment. Defendant appeals as of right. Because we conclude that defendant has failed to demonstrate ineffective assistance of counsel, we affirm.

At about 4:00 a.m. on August 4, 2009, defendant was at a truck stop in Marshall, Michigan. Defendant prepaid for \$20 worth of gasoline in the truck stop store, and asked the cashier whether the store sold knives. The cashier directed defendant to the knife area, and defendant looked at the knives before leaving the store “in a hurry.” Around the same time, a woman’s scream woke a truck driver who was asleep in his truck in the truck stop parking lot. The truck driver observed a man, later identified as defendant, pursuing a woman, later identified as defendant’s wife and the victim in this case. He saw defendant and the victim walking together, and defendant had his arm around the victim’s shoulders as if he was supporting her. The truck driver heard more screaming after defendant and the victim walked out of his sight. He observed the victim run in front of his truck again, and noticed that her shirt was bloody. The truck driver saw defendant run up to the victim, grab her arm, and walk her back out of the truck driver’s sight. After defendant briefly disappeared with the victim, the truck driver saw defendant on his cellular telephone, and observed what he believed was a knife in defendant’s hand. Shortly thereafter, the police arrived on the scene. Defendant was arrested and interviewed by police about an hour and a half later. During the interview, defendant admitted that he stabbed the victim and cut her throat. The victim was pronounced dead on the scene.

The trial court ordered that defendant undergo a competency examination, and defendant was initially found incompetent to stand trial. Defendant began treatment at the Center for Forensic Psychiatry on December 2, 2009, and defense counsel filed a notice of insanity defense.

Another competency hearing began on February 16, 2010. The hearing was adjourned until medical records concerning defendant's treatment could be received, and was finally concluded on April 22, 2010. After hearing testimony regarding defendant's treatment and behavior, the trial court found defendant competent to stand trial. Defense counsel filed another notice of insanity defense, and a follow up competency examination was conducted on July 12, 2010. On October 1, 2010, the trial court again found that defendant was competent to stand trial. Defendant was ordered to undergo an examination relative to his criminal responsibility. In early 2011, a doctor at the Center for Forensic Psychiatry found that defendant was criminally responsible for his actions. In 2011, defendant's competency to stand trial was again evaluated by a forensic psychologist, who concluded that there was no basis for finding that defendant had a mental illness.

Defendant's trial began on April 20, 2011. At trial, defendant testified that he stabbed the victim after she admitted to cheating on him and indicated that she wanted to end their relationship. Defendant maintained that he only stabbed the victim five times, and that he did not intend to kill her. Defense counsel argued that the jury should find that defendant was guilty of manslaughter; the prosecution argued that defendant was guilty of premeditated, first-degree murder. The jury convicted defendant of first-degree murder.

Following his conviction, defendant filed a claim of appeal and a motion for remand for a *Ginther*¹ hearing to make a record regarding defense counsel's alleged failure to investigate and present an insanity defense. This Court granted defendant's request for remand, and an evidentiary hearing was held. After hearing extensive testimony² from defense counsel and Jeffrey Wendt, a forensic psychologist, the trial court concluded that defense counsel did not fail to investigate an insanity defense, and that defendant failed to demonstrate ineffective assistance of counsel, and entered an order denying defendant's motion for a new trial. Defendant now appeals.

On appeal, defendant argues that defense counsel's failure to investigate and present an insanity defense on defendant's behalf constituted ineffective assistance of counsel. Specifically, defendant argues that defense counsel's ultimate decision not to obtain an independent examination of defendant regarding defendant's sanity fell below an objective standard of reasonableness. Defendant also argues that defense counsel was ineffective for failing to present an insanity defense during trial.

The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² This testimony will be referenced throughout our analysis of defendant's ineffective assistance of counsel claim.

was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Toma*, 462 Mich at 302-303, citing *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

“A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “A substantial defense is one that might have made a difference in the outcome of the trial.” *Id.* Insanity is an affirmative defense that may be raised by a defendant where the defendant, as a result of mental illness or mental retardation, lacked substantial capacity to either “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.” MCL 768.21a(1). “The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.” MCL 768.21a(3). A decision whether to present an insanity defense can be an issue of trial strategy, and we will not reverse where the failure to raise an insanity defense was a question of trial strategy. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). Defense counsel’s decision not to present an insanity defense is a matter of trial strategy where the counsel chooses to pursue another defense based on a tactical choice. *People v Lotter*, 103 Mich App 386, 390-391; 302 NW2d 879 (1981). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Here, the pre-trial record shows that defense counsel preserved the ability to raise an insanity defense by filing appropriate notices with the trial court. Further, during the remand hearing, defense counsel testified that after he first met defendant, he requested that defendant’s mental health be evaluated. Defense counsel interviewed defendant 15 to 20 times during the course of the case. Defense counsel interviewed defendant’s family members regarding defendant’s mental health, including approximately 20 discussions with defendant’s mother. Defense counsel investigated psychiatric reports regarding defendant’s mental health prepared by Dr. George Daigle, John Scully, Dr. Isabella Jenkins, Dr. Steve Norris, and Dr. Pria Rhom. Finally, defense counsel also considered an independent examination of defendant’s mental health “to cover all the bases.” Defense counsel contacted four psychiatrists, but each was either unable or unwilling to examine or reexamine defendant. Defense counsel ultimately chose not to pursue an independent examination further because he believed that it would have been a waste of time based on the rest of his investigation into the insanity defense.

While defendant argues defense counsel was ineffective for failing to obtain an independent examination, defense counsel was required to make reasonable investigations, or to make a reasonable decision that makes a particular investigation unnecessary. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). Here, defense counsel’s investigation into the insanity defense revealed that defendant told defense counsel that he had heard the victim’s voice after the incident and that he did not believe that victim was dead, and he believed that the FBI was after him. However, defendant did not tell defense counsel that he heard voices in his head

while he was killing his wife. Defendant never told defense counsel that he was suffering from a mental illness on the day of the incident. Also, defendant was “very calm” during his interviews and responsive to defense counsel. Defendant’s mother told defense counsel that defendant hit his head when he was eight years old but that he did not exhibit any strange behavior afterward. The rest of defendant’s family told defense counsel that, other than defendant’s jealousy toward the victim, there had not been any kind of significant psychological issue in his life.

Defense counsel also reviewed the psychiatric reports. Daigle’s report indicated that defendant reported receiving threats from other truck drivers and store owners and that people listened in on his telephone conversations. Daigle’s report also revealed that defendant reported experiencing auditory hallucinations. Daigle’s report concluded that defendant was incompetent to stand trial. However, the other psychiatric reports, issued subsequent to Daigle’s report, contradicted Daigle’s findings. Scully’s report indicated that defendant was competent to stand trial and was likely malingering in regard to his symptoms of mental illness. Jenkins’ report concurred with Scully’s report, concluding that defendant was competent to stand trial and that defendant was malingering. Norris’ report concluded that while defendant was mentally ill at the time of the incident, defendant was criminally responsible for his actions. Rhom’s report indicated that there was no basis for finding that defendant had a mental illness.

At the *Ginther* hearing held in regard to this issue, defense counsel testified that based on his investigation into the insanity defense he did not believe that he could meet the burden of proof for the insanity defense. Defense counsel testified that he concluded that presenting a manslaughter defense to the jury rather than an insanity defense was a better choice. Defense counsel chose to pursue a manslaughter defense because defendant had already confessed to killing the victim and defendant claimed to him that he went into a spontaneous rage before killing the victim.

Based on this record, we conclude that defense counsel’s decision to end his investigation of the insanity defense without obtaining an independent evaluation was reasonable where the remainder of his extensive investigation into defendant’s mental health did not support such a defense. Not only did defense counsel extensively investigate defendant’s mental health, he made a reasonable decision that made obtaining an independent evaluation unnecessary. *Id.* Defendant has failed to show that defense counsel failed to investigate an insanity defense. *Kelly*, 186 Mich App at 526.

We similarly reject defendant’s argument that defense counsel was ineffective for failing to present an insanity defense. As discussed, defense counsel’s investigation of the possibility of raising that defense revealed a series of pieces of evidence that weighed against the potential success of presenting an insanity defense at trial. In addition, defense counsel found that pursuing a manslaughter defense was consistent with defendant’s confession to killing the victim and defendant’s statements to him. Accordingly, defense counsel decided to present a manslaughter defense. Defense counsel’s decision not to present an insanity defense is a matter of trial strategy where counsel chooses to pursue another defense based on a tactical choice. *Lotter*, 103 Mich App at 390-391. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight,” *Rockey*, 237 Mich App at 76-77. Defendant has failed to rebut the strong presumption of effective assistance of counsel, and defendant has not shown that defense

counsel's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302; *Solmonson*, 261 Mich App at 663.

Next, defendant argues that defense counsel was ineffective for failing to object to the admission of testimony that defendant admitted to a prior act of domestic violence. This issue is not preserved because defendant failed to make a testimonial record regarding this issue during the *Ginther* hearing. *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). Because this issue is unpreserved, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The challenged evidence on appeal comes from a portion of Sergeant Timothy Earl Bryant's testimony. The prosecutor elicited testimony from Bryant regarding defendant's confession to killing the victim and then asked Bryant "[d]id he personally ever tell you about prior incidents when he had physically assaulted her?" Bryant responded:

[h]e told me about the time he held a large hammer over her head. He said that he did not hit her with it, but he was angry, there was some kind of issue where he felt she was cheating, and he held the hammer over her head but he, he said I did not hit her with it or words to that effect.

While defendant recognizes that MCL 768.27b(1) permits admission of other acts of domestic violence, he specifically argues that defense counsel should have objected to Bryant's testimony because the evidence should have been excluded by MRE 403.³

MCL 768.27b(1) provides in relevant part: "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403." MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,"

In *People v Cameron*, 291 Mich App 599; 806 NW2d 371 (2011), we addressed how the balancing test of MRE 403 should be applied to MCL 768.27b. Two inquiries must be made. First, we must decide whether the introduction of the other acts evidence at trial was unfairly prejudicial. *Id.* at 611. Then, we must apply the balancing test and weigh the probativeness or relevance of the evidence against any unfair prejudice. *Id.* Unfair prejudice "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Id.* (quotation omitted). "Evidence is [also] unfairly prejudicial when there exists a

³ Defendant argues in the alternative that the challenged evidence was inadmissible under MRE 404(b). However, defendant acknowledges on appeal that the evidence was admitted solely on the basis of MCL 768.27b(2). Thus, defendant's argument in regard to MRE 404(b) is inapplicable to this case. We need not address hypothetical arguments. *People v Newton*, 257 Mich App 61, 67 n 2; 665 NW2d 504 (2003).

danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). However, “[a]ll evidence offered by the parties is ‘prejudicial’ to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded.” *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).

Defendant claims that the evidence of the prior act of domestic violence was unfairly prejudicial because “it provided the jury with evidence from which they could infer premeditation from an otherwise completely inexplicable and unprovoked crime.” Defendant further argues that the evidence “only served to notify jury [sic] that [defendant] was a bad man. It was not probative of the truth regarding the allegations made in this case.”

Defendant’s defense in this case was that he killed the victim in the passion of the moment, without premeditation, and without intending to kill the victim, because the victim told him that she was cheating on him and that she was going to leave him. The challenged evidence shows that defendant had previously threatened the victim with violence or death because of his suspicions that the victim was cheating on him. This fact undermined defendant’s argument that he reacted to the victim’s cheating by killing the victim in the passion of the moment. Further, the challenged prior act allowed the inference that defendant had weighed the possibility of killing the victim in the past and that when the victim confirmed the fact that she was cheating on him, defendant reacted based on a prior plan to kill the victim. Thus, the challenged evidence was relevant to determining premeditation, a contested element in this case, and the evidence had significant probative value. Accordingly, defendant’s claim that the challenged evidence would improperly allow the jury to infer premeditation merely describes a fear of prejudice from that evidence, and “the fear of prejudice does not generally render the evidence inadmissible.” *Mills*, 450 Mich at 75. Defendant does not show that the probative value of the challenged evidence was substantially outweighed by a danger of unfair prejudice. *Id.* The challenged evidence was not excludable under MRE 403, and was properly admitted under MCL 768.27b(1).

Because the evidence was admissible under MCL 768.27b(1), any objection to the evidence’s admission would have been meritless. Defense counsel is not required to advocate meritless objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant has not shown that defense counsel’s representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro