

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 16, 2014

v

ALVEN DEANDRE SHARP,

Defendant-Appellant.

No. 318086
Macomb Circuit Court
LC No. 2012-002772-FC

Before: BORRELLO, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for armed robbery, MCL 750.529; unlawful imprisonment, MCL 750.349b; illegal use of a financial transaction device, MCL 750.157q; interfering with a crime report, MCL 750.483a; and carjacking, MCL 750.529a. He was sentenced to concurrent prison terms of 23 to 40 years for armed robbery and carjacking, 10 to 15 years for unlawful imprisonment, two to four years for illegal use of a financial transaction device, and one year for interfering with a crime report. The victim was his mother. We affirm.

Defendant first contends that the trial court erred in denying his motion for an independent forensic evaluation because his medical problems and history showed that he was legally insane. This Court reviews a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness for an abuse of discretion. *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006) citing MCL 775.15.

Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or intellectual disability as defined in the mental health code, 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). A defendant seeking to assert an insanity defense must file and serve upon the court and the prosecuting attorney a notice in writing of his or her intention to assert the defense of insanity not less than 30 days before the date set for trial. MCL 768.20a(1). This Court has held that, pursuant to MCL 768.20a(2), a trial court has no discretion to deny a psychiatric examination by the forensic center when a defendant has asserted an insanity defense. *People v Chapman*, 165 Mich App 215, 218; 418 NW2d 658 (1987). However, the record does not reveal that defendant either filed or served notice of his intention to assert the defense of insanity. Therefore, a psychiatric examination by the forensic center was not mandatory. It is within the trial court's discretion to

order that the county pay for an independent psychiatric evaluation. MCL 768.20a(3) (“If the defendant is indigent, the court *may, upon showing of good cause*, order that the county pay for an independent psychiatric evaluation.” [Emphasis added.]

The record shows that the trial court entered two orders referring defendant to the Center for Forensic Psychiatry for competency and criminal responsibility evaluations. The resultant reports were supplied to the court and the parties. Both extremely detailed reports contained extensive and thorough explanations of the factors that led to the psychologist’s conclusions that defendant was competent to stand trial and did not meet the statutory criteria for legal insanity in relation to the present charges. These reports included information that the psychologist received from all the available records from the Michigan Department of Corrections, the Oakland County Jail Inmate Mental Health Services, the Oakland County Easter Seals Jail Mental Health Services, Macomb County Correct Care Solutions, Botsford Hospital, Macomb County Community Mental Health Services, police reports, and information defendant reported to the psychologist regarding his mental health history. The parties stipulated to these reports and the trial court subsequently signed an order stating that defendant was competent to stand trial. Defendant subsequently changed attorneys and the successor attorney near the eve of trial made an oral motion for an independent forensic evaluation, contending that the psychologist was biased and did not consider defendant’s medical history and the report did not contain all the information concerning defendant’s mental conditions and hospitalizations. The court denied the motion after finding that the reports were accurate and that defendant had not demonstrated a need for an independent evaluation.

Upon review, we find that all the information defendant has raised concerning his mental health history was considered by the psychologist. Both reports show that the psychologist was cognizant of defendant’s medical history. However, “[m]ental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity.” 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).

In addition to considering the reports and records provided, the psychologist spent approximately three hours and forty-five minutes with defendant. Defendant has offered nothing more than his argument in support of his bias allegation. He has not asserted any irregularity with the forensic evaluation that would warrant seeking a second opinion. Defendant has not demonstrated by a preponderance of the evidence that a second independent evaluation was necessary. Accordingly, we find that the trial court did not abuse its discretion when it denied defendant’s motion for a second independent forensic evaluation.

Next, defendant contends that he was denied his constitutional right to the effective assistance of counsel because his attorney failed to confront the complaining witness with a prior conviction of embezzlement. To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant did not move for a new trial or seek a *Ginther* hearing in the trial court, and therefore his claim of ineffective assistance of counsel is unpreserved. Therefore, our review of defendant’s unpreserved claim of ineffective assistance of counsel is for errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). To

establish that a defendant's trial counsel was ineffective, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Lockett*, 295 Mich App at 187.

Defendant argues that counsel was ineffective in his preparation for and execution of the cross examination of the complaining witness. At the preliminary examination, defense counsel asked the complaining witness if she had been convicted of embezzlement. She replied in the affirmative, and stated that it occurred in 2003. She also admitted a conviction for filing a fraudulent tax return in 1995. Before trial, defense counsel raised the issue of whether he could use the embezzlement conviction to impeach the witness. The prosecutor informed the court that he had searched and had found no convictions for the witness and, even if there had been that evidence, a conviction from 2003 would not be admissible under MRE 609. The trial court denied defense counsel's motion to impeach the witness with the conviction.

On appeal, defendant produced records from the Oakland Circuit Court showing that the victim pleaded no contest to a charge of embezzlement in excess of \$20,000, MCL 750.174(5)(a), in 2004 not 2003. Defendant argues that he was denied the effective assistance of counsel because his attorney failed to research the records of the Oakland Circuit Court to establish that the victim had been convicted of embezzlement not more than 10 years before his trial, which resulted in the denial of the opportunity to impeach the complaining witness and challenge her credibility. Defendant contends that if the victim had been confronted with her embezzlement conviction, the outcome of the trial could have been different.

We find that defense counsel's failure to do the proper research in order to be prepared to argue his motion cannot be considered to be a matter of trial strategy. The record shows that defense counsel wanted to impeach the witness with her prior conviction but he was clearly not prepared to support his argument because despite the witness' admission he relied on the prosecutor to do the research. Trial counsel has a duty to conduct a reasonable investigation, and a failure to do so can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). If defendant's attorney had obtained the records, he could have shown the trial court that there was, in fact, a conviction, that more than 10 years had not elapsed since the conviction, and that all of the requirements of MRE 609 were satisfied. Having failed to do the proper research, defendant's attorney was unable to impeach the witness. Thus, defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 US 688.

However, defendant cannot establish the second prong of the analysis—a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. The defendant's testimony, in direct contradiction to the victim's version of events, was that he and the victim were engaged in a criminal enterprise and that she gave him permission to use the automobile and her visa card. Defendant contends that, except for the car chase and a statement he made to a police officer at the hospital, the case against him relied entirely upon the testimony of the victim. We disagree. The responding police officer, called to the victim's home after the incident, testified that he found the victim visibly distraught and upset. He found a belt on the living room floor, which the victim testified defendant had taken from her closet and used to tie

her arms behind her back. The officer placed it into an evidence bag. He noticed a chair was knocked down on the living room floor. While he was there, he suggested that the victim call her credit card company to report it stolen, and when she did, the officer spoke with the person who answered the telephone and was told that a transaction with the card had just occurred at a gas station. The officer then went to the gas station and confirmed the transaction. A second police officer testified that he was involved in the car chase. During the chase he saw defendant throw a large knife out of the driver's side window. The knife was recovered and the victim identified that knife as the one defendant used in the robbery and assault. In addition, that officer recovered the victim's Visa credit card from defendant's person. The credit card statement was entered into evidence. A third police officer testified that, after defendant was taken to the hospital, he made a voluntary statement to that officer that he had tied up the victim and did not want to hurt her. Finally, the vehicle that defendant was driving during the chase belonged to the victim. All this testimony and the evidence supported the victim's testimony.

We find that, even if the victim's credibility had been weakened by her prior conviction for embezzlement, there was sufficient corroborating evidence to support her testimony. Defendant has failed to demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 US at 688.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens