

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RAYMOND EUGENE LLOYD, JR., also known as
RUFUS BROWN,

Defendant-Appellant.

UNPUBLISHED

January 25, 2000

No. 186131

St. Clair Circuit Court

LC No. 94-002308 FC

ON REMAND

Before: Saad, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court. Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appealed his convictions as of right. This Court reversed defendant's convictions and remanded for a new trial after concluding that defendant was denied the effective assistance of counsel because his trial attorney failed to properly investigate and present the defenses of diminished capacity and insanity.¹ *People v Lloyd*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 1998 (Docket No. 186131). The prosecution sought leave to appeal from this Court's decision. In lieu of granting leave to appeal, the Supreme Court reversed this Court's judgment and remanded the case to this Court for consideration of the issues raised by defendant but not addressed by this Court. *People v Lloyd*, 459 Mich 433; 590 NW2d 738 (1999). We remand for a competency hearing.

In our original opinion, we concluded that the trial court erred in failing to give the jury the definitions of mental illness and diminished capacity prior to the presentation of expert testimony on those issues and compounded the error by failing to define mental illness and to instruct the jury to consider a verdict of guilty but mentally ill in its closing instructions. However, we did not consider whether the instructional error warranted reversal. We now conclude that the failure to properly instruct the jury regarding diminished capacity, mental illness, and the possibility of a verdict of guilty but mentally ill was harmless error.

The instructional errors are subject to harmless error analysis. *People v Grant*, 445 Mich 535, 543; 520 NW2d 123 (1994). However, because defendant did not request the instructions, defendant must demonstrate that he has not forfeited the unpreserved error. Because the failure to give the instructions was unpreserved nonconstitutional error, *Grant, supra* at 547, defendant can avoid forfeiture only by showing that the error was a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; ___ NW2d ___ (1999). We conclude that the error was plain, in that it was “clear and obvious.” *Carines, supra* at 763; *Grant, supra* at 552. To show that the error affected defendant's substantial rights, defendant must persuade the reviewing court that the error was prejudicial, that is, that the error affected the outcome of the lower court proceedings. *Carines, supra; Grant, supra* at 553.

Here, defendant provided notice before trial that he intended to present a diminished capacity offense. To prove diminished capacity, defendant was required to show that he lacked the specific intent necessary for a first-degree murder conviction. *People v Denton*, 138 Mich App 568, 571; 360 NW2d 245 (1984). “[A] necessary component of the diminished capacity defense is that the defendant was mentally ill.” *People v Pickens*, 446 Mich 298, 331; 521 NW2d 797 (1994). Dr. Virginia O'Reilly testified that defendant suffered from mental illness in that he suffered from a paranoid personality disorder and a schizotypal personality disorder. Dr. O'Reilly further testified that such disorders affected defendant's ability to make choices when his sense of danger was triggered. However, she also testified that defendant could take specifically intended actions. Dr. O'Reilly's testimony that defendant could take specifically intended actions directly rebutted the defense of diminished capacity, which required a showing that defendant lacked the ability to form the specific intent required to establish first-degree murder. Thus, while the trial court's failure to instruct the jury regarding mental illness and diminished capacity before Dr. O'Reilly's testimony deprived the jury of a framework in which to consider Dr. O'Reilly's testimony that defendant was mentally ill, because there was no expert testimony indicating that defendant was unable to form the intent required for first-degree murder and because the jury was properly instructed regarding diminished capacity before beginning its deliberations, we cannot conclude that the trial court's failure to instruct the jury regarding diminished capacity and mental illness before the presentation of expert testimony on those issues was prejudicial. Therefore, the error does not require reversal.

Similarly, we cannot conclude that the court's failure to instruct the jury regarding the possibility of a guilty but mentally ill verdict was prejudicial. To find a defendant guilty but mentally ill, the jury must find that 1) the defendant was guilty of the offense, 2) the defendant was mentally ill at the time of the crime, and 3) the defendant was not legally insane. MCL 768.36(1); MSA 28.1059(1); *People v Phil Clark*, 172 Mich App 1, 7; 432 NW2d 173 (1988). An instruction regarding a guilty but mentally ill verdict was warranted by the evidence in the instant case. First, defendant presented a diminished capacity defense, which falls within the definition of legal insanity. *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978). Furthermore, Dr. O'Reilly testified that defendant was mentally ill. Because the jury found that defendant was guilty of the charged offenses, but rejected his diminished capacity defense, and because there was evidence from which the jury could have found that defendant was mentally ill, the jury very well may have found defendant guilty but mentally ill had it been given that option. “The purpose of a guilty but mentally ill verdict is to insure that a criminally

responsible but mentally ill defendant receives treatment.” *Phil Clark, supra* at 4. However, in defendant's prior appeal to the Supreme Court, the Court stated that, because a person found guilty but mentally ill of first-degree murder still must serve life in prison, the “failure to obtain such a verdict would scarcely constitute prejudice to the defendant.” *Lloyd, supra* at 451. Thus, while the jury very well may have found defendant guilty but mentally ill on the basis of the evidence presented, we cannot conclude that the court’s foreclosure of that possibility was prejudicial to defendant. *Id.*

Defendant next argues that the prosecutor erred when he urged the jury to reject the testimony of defendant's expert, Dr. O'Reilly, because she gave the MMPI-2 test orally and failed to repeat the test when it came back invalid. We disagree. The test for prosecutorial misconduct is whether the prosecutor’s comments or conduct denied the defendant a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court must examine the pertinent portions of the record and evaluate the prosecutor’s remarks in context. *Id.*

It is improper for a prosecutor to attack a defense expert unless there is evidence to support the prosecutor’s remarks. *People v Howard*, 226 Mich App 528, 545-546; 575 NW2d 16 (1997). Here, the prosecutor’s arguments were supported by the evidence. Dr. O'Reilly admitted that an audiotaped version of the test was available and that defendant's case was the first time in her career that she had decided to administer the test orally. Dr. O'Reilly further testified that she deviated from the recommendation to re-administer the test when the results indicated that the test was invalid. Whether defendant suffered from diminished capacity was an important issue at trial and it was not improper for the prosecutor to question the validity of the testing procedures. While defendant argues that it was unfair for the prosecutor to comment on the testing procedures where the defense was given only one week to obtain the evaluation and Dr. O'Reilly had only one day available on which she could administer the test, defense counsel could have moved for a continuance or selected another expert, and any resulting prejudice was not attributable to the prosecution. We therefore conclude that defendant was not denied a fair and impartial trial by the prosecutor’s remarks.

Defendant next argues that the trial court erred when it gave him only one week to secure an independent psychological evaluation. Defendant asserts that the short time period forced him to obtain the evaluation from a psychologist inexperienced in the relevant issues. We find no error. A trial court’s decision regarding a motion for a continuance is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

Defense counsel requested a seven-day continuance for the purpose of obtaining a psychological evaluation of defendant. The trial court granted the request. Defense counsel did not request an extension of the continuance. “It is axiomatic that error cannot be predicated on failing to grant that which was not requested.” *People v McLendon*, 51 Mich App 543, 546; 215 NW2d 742 (1974). Thus, we find no abuse of discretion in the trial court’s grant of the seven-day continuance. To the extent that defendant argues that defense counsel erred in failing to request an independent evaluation earlier, defendant's claim that defense counsel failed to properly investigate and present the diminished capacity/insanity defense was rejected by our Supreme Court.

Next, defendant contends that the cumulative effect of trial errors denied him a fair trial. Although one error in a trial may not require reversal, the cumulative effect of numerous trial errors may add up to error requiring reversal. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). However, because defendant has not shown any trial errors other than the instructional error, which we found not to be prejudicial, we reject his claim that cumulative error denied him a fair trial.

Defendant next argues that the trial court erred in failing to order a nunc pro tunc competency evaluation where it was presented with an expert and a lay opinion that defendant was not competent to stand trial. We agree.

A criminal defendant is presumed to be competent to stand trial absent a showing that the defendant “is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner.” MCL 330.2020(1); MSA 14.800(1020)(1); *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). A defendant who is determined incompetent to stand trial shall not be proceeded against while he is incompetent.” MCL 330.2022(1); MSA 14.800(1022)(1). The determination of a defendant's competence to stand trial is a matter within the discretion of the trial court. *Harris, supra*. However, a trial court has a duty to raise the issue of incompetence “where facts are brought to its attention which raise a ‘bona fide doubt’ as to the defendant's competence.” *Id.* A trial court's decision with respect to whether a “bona fide doubt” exists is reviewed for an abuse of discretion. *Id.*

Here, the trial court did not err in failing to hold a competency hearing before trial. Counsel stipulated before trial that defendant was competent to stand trial. Defense counsel's opinion that defendant was competent to stand trial was based, at least in part, on the psychological evaluation performed by Stephen Norris. While Norris' evaluation focused on the issue of criminal responsibility rather than competency, defense counsel explained that portions of the report could also relate to competency. Norris' report concluded that defendant was not mentally ill or mentally retarded at the time of the murder and that he “displayed no difficulties in attention, concentration, or general memory ability.” Thus, because the trial court was not presented with any facts before trial that raised a bona fide doubt regarding defendant's competence to stand trial, it did not abuse its discretion in failing to hold a competency hearing before trial.

However, after trial, defendant moved for a nunc pro tunc competency evaluation. Defense counsel sought to have Dr. O'Reilly, defendant's mother, and defendant's cousin testify at the motion hearing to give substance to defendant's claim that he was incompetent at the time of trial. See *People v Lucas*, 393 Mich 522, 528; 227 NW2d 763 (1975). The trial court refused to allow the testimony, stating that it would rely on the affidavits submitted by defendant's counsel. Defense counsel then submitted offers of proof regarding the testimony of Dr. O'Reilly, defendant's mother, and defendant's cousin. Defense counsel stated that Dr. O'Reilly would have testified that, when she saw defendant in March 1995, “it was her opinion that he was incapable of providing rational assistance to his attorney.” Along with his motion, defense counsel submitted community mental health records and jail records. The trial court denied defendant's motion for a competency evaluation, stating that an evaluation had already been done by Dr. Norris of the Center for Forensic Psychiatry and that there was no evidence that a reevaluation was required.

Contrary to the trial court's statement that a competency evaluation was conducted by Dr. Norris, a competency evaluation was never performed in the instant case. The psychological evaluation performed by Dr. Norris, on which defendant's trial counsel relied when he stipulated that defendant was competent to stand trial, focused on defendant's criminal responsibility. Dr. Norris did not opine whether defendant was competent to stand trial. However, the failure to hold a competency hearing does not ipso facto entitle a defendant to a new trial. *People v Blocker*, 393 Mich 501, 510; 227 NW2d 767 (1975); *People v Vokes*, 134 Mich App 62, 64; 349 NW2d 819 (1984). "Evidence substantiating incompetency-in-fact must establish that there is a violation of rights before a new trial will be ordered." *Lucas, supra* at 528. Here, defense counsel requested that the court hear testimony from Dr. O'Reilly. When the trial court refused to hear the testimony, defense counsel made an offer of proof indicating that Dr. O'Reilly would testify that defendant was incompetent at the time of trial on the basis of her observations of defendant before trial. Defendant also submitted community mental health records, jail records, and affidavits of his mother and cousin. We conclude that the evidence presented established a bona fide doubt regarding defendant's competency to stand trial. *Harris, supra* at 102. Given that a competency hearing was not conducted before trial and that the trial court was presented with evidence at the post-trial hearing establishing a bona fide doubt regarding defendant's competency to stand trial, we conclude that defendant is entitled to a nunc pro tunc competency hearing. While we recognize the difficulty in conducting a competency hearing several years after trial, see *Blocker, supra* at 509, n 1, that difficulty is somewhat lessened here where there exists some evidence of defendant's competence at the time of trial.

Finally, defendant argues that the trial court erred in denying his motion for a new trial on the basis of newly discovered evidence. We disagree. A trial court's decision regarding a motion for a new trial on the basis of newly discovered evidence is reviewed for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

A party may move for a new trial on the basis of "material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." MCR 2.611(1)(f). A motion for a new trial brought on the basis of newly discovered evidence may be granted where 1) the evidence itself, not merely its materiality, is newly discovered, 2) the evidence is not merely cumulative, 3) the evidence is such as to render a different result probable on retrial, and 4) the defendant, exercising reasonable diligence, could not have produced the evidence at trial. *Id.* Here, defendant asserts that he is entitled to a new trial because Dr. O'Reilly has changed her opinion with respect to whether defendant was legally insane at the time of the murder.

Before trial, Dr. O'Reilly apparently informed defense counsel that it was her opinion that defendant was not legally insane at the time of the murder. Defendant asserts that Dr. O'Reilly has since changed her opinion and now believes that defendant was insane at the time of the murder, and that her change of opinion constitutes newly discovered evidence. Along with his motion for a new trial, defendant submitted an affidavit of defense counsel regarding defense counsel's discussions with Dr. O'Reilly after trial. Defense counsel's affidavit indicates that Dr. O'Reilly told him in October and November 1995, that she was mistaken when she told defendant's trial counsel before trial that defendant's mental condition at the time of the murder did not satisfy the statutory definition of insanity,

and that her error was based on her unfamiliarity with the definition of legal insanity. However, in response to defendant's motion for a new trial, the prosecutor submitted an affidavit of Dr. O'Reilly, dated more recently than defense counsel's affidavit, in which Dr. O'Reilly testified that "since trial in this matter I have not changed my diagnosis with respect to Raymond Eugene Lloyd, Jr.'s mental condition. I affirm the integrity and accuracy of my evaluation as I testified at trial and if I were to testify today my testimony would remain the same."

Here, the trial court relied on Dr. O'Reilly's affidavit submitted by the prosecution when denying the motion for a new trial, rather than the affidavit of defense counsel. A trial court may evaluate the credibility of evidence when deciding a motion for a new trial. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). In light of Dr. O'Reilly's affidavit indicating that her diagnosis, evaluation, and testimony would remain the same, the trial court's decision to deny defendant's motion for a new trial on the basis of newly discovered evidence was not an abuse of discretion.

Remanded for a competency hearing. We affirm on all other issues. Thus, if the trial court determines that defendant was competent to stand trial, his convictions are affirmed. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Martin M. Doctoroff

¹ Judge Saad dissented from the majority opinion on the basis of his conclusion that defense counsel's conduct was objectively reasonable and that no prejudice resulted from counsel's failure to pursue an insanity defense where the defense expert was unable to testify that defendant was legally insane.