STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2001
v	No. 211409 Wayne Circuit Court
ANTHONY DWAYNE WASHINGTON, Defendant-Appellant.	Criminal Division LC No. 94-012339

Before: Bandstra C.J., and Wilder and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to fifteen to twenty two and a half years' imprisonment for the manslaughter conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was charged with first-degree premeditated murder, MCL 750.316; MSA 28.548, in the shooting death of John Holland, and assault with intent to murder MCL 750.83; MSA 28.278, in connection with the attempted shooting of John's brother, Ernest Holland, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). While defendant was convicted of involuntary manslaughter and possession of a firearm during the commission of a felony, the jury acquitted defendant of the assault with intent to murder charge and first-degree murder.

Defendant's competency to stand trial was questioned several times before trial. On March 1, 1996, following a competency hearing, defendant was declared incompetent to stand trial and committed to the Department of Mental Health for a period of up to fifteen months to undergo treatment in an effort to render him competent. Following treatment, defendant was found competent to stand trial on June 3, 1997, by stipulation of the parties. However, on September 22, 1997, the trial court granted defense counsel's request for the appointment of an independent psychologist, John Stryker, to examine defendant both for competency and criminal responsibility. At a competency hearing held on October 31, 1997, defendant was again found

competent to stand trial. This finding has not been appealed by defendant. The court set December 15, 1997 as defendant's trial date.

On December 12, 1997, defense counsel requested an adjournment based on the claim that defendant was not competent to stand trial. This belief arose out of defendant's sessions with Stryker on November 29 and December 9, 1997, in which Stryker developed the opinion that defendant was incompetent to stand trial. The trial judge referred the matter to the presiding judge of the criminal division pursuant to a docket control initiative, and defendant and defense counsel appeared before the presiding judge on December 15, 1997. The presiding judge ordered an immediate competency examination, and took testimony later that day from the director of the criminal division of the circuit court's psychiatric clinic. Based on the psychologist's evaluation and testimony, the presiding judge found defendant competent and ordered him to stand trial.

I

Defendant first contends that the presiding judge abused her discretion in ordering a competency hearing without first obtaining a written report from the examiner and without giving defense counsel adequate time to prepare. We disagree.

The determination of a defendant's competence is within the trial court's discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). However, the 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.*, quoting *People v Johnson*, 58 Mich App 473, 475; 228 NW2d 429 (1975). Whether a "bona fide doubt" exists is also within the discretion of the trial court. *Id.*

A criminal defendant is "presumed competent to stand trial" and will be determined incompetent "only if he 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). The trial court "shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial." *Id.*; MSA 14.800(1020)(1) Unless the issue of a defendant's competence arises during the course of proceedings, a motion raising the issue must be in writing. MCR 6.125(B). The trial court must order the defendant to undergo an examination by personnel of a facility officially certified by the department of mental health to perform competency examinations whenever it is determined that the defendant may not be competent to stand trial. MCL 330.2026; MSA 14.800(1026). See also MCR 6.125(C)(1). The psychiatric facility must examine the defendant and consult with defense counsel, may consult with the prosecutor or other persons, and must submit a written report to the court, prosecuting attorney, and defense counsel within sixty days of the order. MCL 330.2028(1); MSA 14.800(1028)(1). After receiving the written report, the court must hold a hearing to determine whether the defendant is competent to stand trial. MCL 330.2030; MSA 14.800(1030); MCR 6.125(E).

In *People v James*, 87 Mich App 412; 274 NW2d 801 (1978), defense counsel moved for a competency examination on the date set for trial. The trial court scheduled an examination in the court's psychiatric clinic that morning and held a competency hearing in the afternoon. The

trial court heard the testimony of the clinic's psychologist and, based on her testimony, found the defendant competent to stand trial and impaneled a jury. *Id.* at 414-415. On appeal, this Court determined that "it was not reversible error for the court to rest a finding of competency upon the testimony of a qualified psychologist" and, while the clinic clearly erred in not submitting a written report, the clinic's error did not require reversal of the defendant's conviction. *Id.* at 418-419.

In the present case, the presiding judge took testimony from the examining psychologist, and defense counsel was allowed the opportunity to cross-examine the witness. The psychologist, who had interviewed defendant that day, opined that defendant was able to articulate what was happening in the court proceedings and assist his attorney. Accordingly, we find that the presiding judge did not abuse her discretion in ordering an immediate examination and competency hearing when defendant appeared before her on the date set for his trial. *James*, *supra* at 414-415.

While defendant correctly notes that the competency hearing held by the presiding judge occurred before the filing of a formal report, we reject defendant's contention that defense counsel did not have an opportunity to adequately prepare for the hearing. The record indicates that the trial court had previously determined, on October 31, 1997, based on the testimony and report of a forensic psychologist, that defendant was competent to stand trial. Defense counsel had access to all the reports filed in this case and did not move in writing for another determination of competency as required by MCR 6.125(B). Therefore, since defense counsel did not move in writing for another competency hearing and there was no evidence presented that the October 31, 1997 determination was no longer valid, the question of defendant's competence was a matter within the discretion of the presiding judge, *Harris*, *supra* at 102, and we find no abuse of discretion under these circumstances.

II

Defendant next contends that he was denied a fair trial because of negative and hostile remarks made, during jury voir dire, by the court, to prospective jurors who expressed an inability to be impartial. We disagree.

Generally, a party must exhaust its peremptory challenges to preserve a question regarding jury selection for appeal. *People v Jendrzejewski*, 455 Mich 495, 515 n 19 (1997); *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Here, defendant exercised only seven of his twelve peremptory challenges and expressed his satisfaction with the jury. Further, defendant did not object to the challenged comments of the trial court. Thus, this issue has not been preserved for appellate review. Moreover, the trial court allowed both attorneys the opportunity to question all jurors. The challenged comments of the trial court, while at times strong, were plainly intended to remind the jurors that they could not be dismissed because they found the crime distasteful or because jury service was inconvenient. Nonetheless, some prospective jurors were indeed dismissed. The jurors who indicated that they could not be impartial and the juror who proclaimed to be ill were excused for cause. The juror who stated he could not judge based on his religious beliefs was excused through the prosecutor's peremptory challenge. Under these circumstances, defendant was not denied a fair trial.

III

Defendant also contends that he was denied his due process right to present a defense when the presiding judge denied his motion for a continuance to secure an independent examination on the issue of criminal responsibility. We disagree.

This Court reviews the grant or denial of an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). In addition, a defendant must show prejudice as a result of the trial court's abuse of discretion. *Id.* This Court reviews claims of due process violations de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

In order to offer testimony of legal insanity at the time of the charged offense, a defendant must file with the court, and serve on the prosecuting attorney, written notice of his intention to assert an insanity defense at least thirty days before the trial date. MCL 768.20a(1); MSA 28.1043(1)(1). After receipt of this notice, the court must order the defendant to undergo an examination related to his or her claim of insanity. MCL 768.20a(2); MSA 28.1043(1)(2). "The examination for determining criminal responsibility is concerned with the defendant's mental state at the time the defendant committed the offense." *People v Dobben*, 440 Mich 679, 682, n 3; 488 NW2d 726 (1992), citing Boyle & Baughman, *The mental state of the accused: Through a glass darkly*, 65 Mich B J 78 (1986). The focus of the examination is on the defendant's "blameworthiness." *Id.* The examination is undertaken for purposes of establishing an insanity defense at a criminal trial. *Id.*

The victim in this case was shot to death on April 10, 1994. At that time, MCL 768.21a; MSA 28.1044(1)[1] provided that a person was "legally insane if, as a result of mental illness . . . or as a result of mental retardation . . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." The burden of proof was governed by common law, which provided that once a defendant had presented evidence of insanity, "the prosecutor then must go forward and produce evidence beyond a reasonable doubt that the defendant was sane at the time the crime was committed." *People v McRunels*, 237 Mich App 168, 172; 603 NW2d 95 (1999), quoting *In re Certified Question*, 425 Mich 457, 465-466; 390 NW2d 620 (1986).

While it is true defendant's independent examiner did not reach any conclusions regarding defendant's criminal responsibility, the forensic psychologist who testified at the October 31 hearing, noted in a report dated October 17, 1997, that "[n]othing described by the defendant or in the police report indicates that he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." Under these circumstances, the presiding judge did not abuse her discretion in denying defendant an adjournment for further examination on the issue of criminal responsibility, and there was no due process violation. See *People v Smith* 103 Mich App 209, 211; 303 NW2d 9 (1981) ("It was not error for the trial court to deny the request for an independent evaluation when compliance with

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[1] The statute was amended effective October 1, 1994. The primary change was to allocate the burden of proving the defense of insanity by a preponderance of the evidence to the defendant.

the statute would have required a postponement of the trial for at least five days where the defense counsel could have made the request at an earlier time to avoid a delay of the trial.")

IV

Defendant further contends that he was denied the effective assistance of counsel because his trial counsel failed to object to the presiding judge's decision to order an immediate competency hearing without a written report, did not have adequate time to prepare, and failed to call witnesses on his behalf at the competency hearing. We disagree.

Because there was no *Ginther*[2] hearing, this Court's review of this issue is confined to whether the record contains sufficient detail to support defendant's claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; ___ NW2d ___ (2000). To establish ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that a reasonable probability exists that, but for counsel's unprofessional error, the result of the proceedings would have been different. *Snider*, *supra* at 424; *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998).

As stated previously, the trial court found defendant competent to stand trial on October 31, 1997, and defendant does not challenge that finding on appeal. Defense counsel again raised the issue of defendant's competence on the eve of trial, apparently just after an independent examiner declared in a report that defendant was not competent to stand trial. However, the presiding judge had the discretion to determine defendant's competence and to determine whether a bona fide doubt about defendant's competence had arisen. *Harris*, *supra* at 102. It is not reasonably probable that testimony from the independent examiner that defendant was not competent to stand trial would have changed the result of the competency hearing, in light of the earlier finding of competency and the testimony from the clinic's psychologist who interviewed defendant that day and found that he was able to articulate what was going on, understood the nature of the proceedings, and could assist his attorney in preparing a defense. While the defense might have presented a stronger argument that defendant was incompetent had the testimony of the independent examiner been introduced at the December 15, 1997 competency hearing, defendant has not established that the outcome of the proceeding would have been different or that he was otherwise prejudiced by his counsel's alleged error.

V

Defendant also argues that his counsel was constitutionally ineffective because he failed to timely investigate and pursue an insanity defense. A criminal defendant is denied the effective assistance of counsel by his attorney's failure to properly prepare a meritorious insanity defense. *People v Newton (On Remand)*, 179 Mich App 484, 491; 446 NW 487 (1989); *People v Hunt*,

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[2] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

170 Mich App 1, 13; 427 NW2d 907 (1988). The defendant is entitled to a new trial if this omission by counsel deprives him of a reasonably likely chance for acquittal. *Hunt*, *supra* at 13.

The lower court record contains no evidence that defendant lacked the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. MCL 768.21a; MSA 28.1044(1). At trial, defendant testified that he was carrying a weapon for protection as he walked with friends down the street to use a pay telephone. When he returned, he was upset because his house had been torn up from fighting that took place at a party, and he displayed the weapon. Defendant asserted that a friend grabbed his arm and, when defendant shoved back the gun went off, hitting the victim in the back and killing him. Thus, defendant presented a defense to the charged offense of first-degree premeditated murder, which was apparently believed by the jury because defendant was convicted only of involuntary manslaughter. Defendant was also acquitted of the assault with intent to murder charge involving the victim's brother. Defendant has not shown that his counsel's failure to present an insanity defense deprived defendant of a reasonable chance of acquittal; nor did defendant overcome the presumption that counsel's decision making constituted sound trial strategy. Indeed, testimony about defendant's mental state, including defendant's claim to the psychologist that he could not recall the shooting, may have caused the jury to disbelieve defendant's trial testimony and convict him of a more serious offense. Since there is no evidence on the existing record that defendant was criminally insane at the time of the instant offense and because there is no reasonable probability that defense counsel's failure to present an insanity defense deprived defendant of a chance to be acquitted, defendant has not shown that he was denied the effective assistance of counsel.

VI

Finally, defendant argues that he was denied due process because the police coerced a prosecution witness into signing a false statement, and the prosecutor impeached the witness with that statement at trial. We disagree.

Defendant failed to raise this issue for the trial court's consideration; therefore, it has not been preserved for appellate review. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999. However, this Court may consider unpreserved issues where failure to do so would result in manifest injustice. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Attempts by the prosecution to intimidate witnesses from testifying, if successful, amount to a denial of a criminal defendant's constitutional right to due process of law. *People v Pena*, 383 Mich 402; 406; 175 NW2d 767 (1970); *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992). Threats from law enforcement officers may be attributed to the prosecution. *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992).

In the instant case, the jury heard the witness testify that ~~she~~ the police coerced her into signing an incomplete statement and that her trial testimony was true. Additionally, the trial court instructed the jury that they were not to consider previous unsworn testimony except to judge the truthfulness of the witness' trial testimony. Based on this record, we do not find that defendant was denied due process by the prosecutor's introduction of statements the witness made to the police. Further, because defendant was convicted of involuntary manslaughter rather than the charged offense of first-degree murder, the jury apparently believed the witness' trial

testimony that someone touched defendant's hand from behind just before the fatal shots were fired. Accordingly, we find no manifest injustice.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kurtis T. Wilder
/s/ Jeffrey G. Collins