STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 272906 Wayne Circuit Court
JEROME COREY PAHOSKI, Defendant-Appellant.	LC No. 06-004634-01

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent terms of life in prison without parole for the murder convictions, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, conditioned solely on defendant's inability to verify his insanity claim with neurological test results, and we remand for further proceedings consistent with this opinion.

Defendant's convictions arise from the October 25, 2005, shooting deaths of Roger Young, defendant's mother's ex-boyfriend, and Jason McBryar, defendant's friend and Young's tenant. Carl Benton, the victims' neighbor, heard gunshots at approximately 5:00 that afternoon, and saw defendant run from the rear of the victims' home. Benton observed defendant run into the alley and then walk back into the home's backyard. In the backyard, defendant leaned over, pointed a firearm toward the ground and fired a shot. Defendant reentered the house, and Benton heard another gunshot. Benton watched defendant walk down the street, remove his grey hooded sweatshirt and wrap it around his firearm. When defendant had walked "a couple of houses down," Benton approached Young's backyard and saw Young's body on the ground, in the same location where defendant had fired the shot.

The police discovered Young's body in the backyard and McBryar's body inside the home. A Michigan State Police investigator described a trail of blood around a basement pool table, and an officer testified that the basement computer had been "knocked over on its side," reflecting "a little struggle." The medical examiner testified that her examination of Young's body revealed, in addition to two gunshot wounds, the presence of two or three superficial cuts

that could have been made by a pocketknife. According to the examiner, McBryar suffered four gunshot wounds.

The police arrested defendant and confiscated his tennis shoes and pocketknife, both of which bore traces of Young's blood. Several weeks later, a repairman working on the back steps of defendant's great aunt's home found a pistol wrapped in a grey hooded sweatshirt bearing defendant's name. A ballistics expert identified the pistol as the weapon used to shoot Young and McBryar.

After defendant's arrest, the district court ordered an evaluation of his competency to stand trial. Dr. George Daigle, a forensic center psychologist, interviewed defendant and concluded that he was competent to stand trial, and that "neither the statutory criteria for mental illness nor the requirements for legal insanity have been satisfied." Dr. Daigle's report noted that defendant's grandmother claimed defendant had suffered from auditory hallucinations as a child, and that jail psychiatrists had diagnosed defendant with "unspecified psychosis," as well as "undifferentiated schizophrenia and alcohol dependence." According to Dr. Daigle, however, his forensic examination and the daily observations of defendant's behavior by mental health and correctional staff contradicted these conclusions.

On April 27, 2006, defense counsel filed a notice of defendant's intent to offer an insanity defense. That same day, at defendant's circuit court arraignment, defense counsel requested an independent psychiatric examination. Initially reluctant to sign an order permitting the independent examination, the arraigning judge agreed to do so after defense counsel urged that he did not want to incur any delay, and that "Dr. [Steven] Miller . . . said as soon as he can get going, he'd appreciate it."

On May 5, 2006, the judge assigned to defendant's trial conducted a pretrial conference, established a trial date of July 31, 2006, and acknowledged awareness of defendant's proposed insanity defense. At a motion hearing on June 16, 2006, defense counsel advised the trial court that Dr. Miller had interviewed defendant at the jail, but needed additional documentary information to complete his report. Defense counsel submitted orders for the production of defendant's medical, school, and jail records, and the court signed them.

On July 7, 2006, defense counsel presented the trial court with email correspondence from Dr. Miller stating that he "is not prepared to proceed any further. He believes he needs a neuropsychological evaluation." The complete text of the email is not included in the trial court record. The trial court read aloud the following portion:

> "[Defendant] was cooperative with the evaluation, polite and responsive; however, when we attempted to talk about his involvement with the alleged offense, he was unable to provide any useful information concerning his mental state or his behavior at the legally relevant time.
>
> "He may be psychologically blocking access to these memories or may be avoiding talking about his actual symptoms or thought processes. I'm not sure what is going on here, and I'm writing to inform you, etcetera, about that."

Defense counsel requested an adjournment of the trial date to allow time for the neuropsychological examination, and told the court that the prosecutor "has no objections to my proposal."

The trial court interpreted Dr. Miller's email as reflecting defendant's "refus[al] to cooperate," and noted that Dr. Daigle had already concluded that defendant was "playing games and malingering, and I think that is basically what's going on here." The trial court denied defendant an adjournment, explaining, "If it doesn't work out and I'm wrong about it, then another court can deal with that later on review, but we are proceeding with trial with the date already of July 31, nine o'clock."

The case proceeded to trial as scheduled. Defendant did not present an insanity defense and called no witnesses. After the parties rested, defendant requested that the trial court instruct the jury on the offense of voluntary manslaughter, and the court agreed to do so. The parties then gave their closing arguments. Defense counsel argued that defendant killed Young in self-defense, and that Young accidentally shot McBryar. According to defense counsel's theory, Young attacked defendant in the basement, and defendant tried to escape Young's grasp by superficially cutting Young's neck and abdomen with his pocketknife. Defense counsel contended that defendant then ran up the basement stairs, Young grabbed a nearby weapon and gave chase and accidentally shot McBryar. Defense counsel's theory suggested that defendant then managed to disarm Young and shot Young in self-defense. Although the trial court allowed defense counsel to argue this scenario to the jury, it refused to instruct the jury on self-defense because counsel had not requested a self-defense instruction. The trial court also refused counsel's request that it provide the jury with defendant's written theory of the case. The jury convicted defendant of two counts of first-degree murder and one count of felony-firearm.

Defendant contends that the trial court erred when it refused to give a self-defense jury instruction. Because the trial court record reveals that defendant did not request this instruction, we review this issue only for plain error that affects defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

"A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). Self-defense by the use of deadly force is an affirmative defense that requires a showing that the defendant honestly and reasonably believed he faced an imminent danger of death or great bodily injury, and that using deadly force was necessary to avoid the danger. See *People v Sorscher*, 151 Mich App 122; 391 NW2d 365 (1986); *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). "The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat." *Id.* Here, the evidence did not support a self-defense instruction because Benton saw defendant run from Young's house towards the alley and then walk back to the backyard where he shot toward Young's body. Even assuming the existence of a basement struggle between defendant and Young, defendant did not limit his use of force or retreat, but instead calmly returned to the backyard and used deadly force against Young. This testimony was not contradicted. Because the facts did not support a self-defense instruction, the trial court's failure to instruct the jury on self-defense did not affect the

outcome of the trial. Defendant further claims, however, that counsel's failure to request a self-defense jury instruction constitutes ineffective assistance of counsel. However, defendant had no factual substantiation for his claim of self-defense, so he cannot demonstrate a reasonable probability that the jury instruction would have changed the result of his trial. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant also argues that the trial court's denial of an adjournment for neuropsychological testing violated his constitutional right to a fair trial. A trial court's decision whether to grant a requested trial adjournment is reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). "[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence." *Id*. at 18; see also MCR 2.503(C). Pursuant to MCL 768.20a(3), a felony defendant asserting an insanity defense has the right to secure an independent psychiatric evaluation, including neurological tests that a psychiatrist deems necessary in assessing the defendant's sanity. See *People v Pickens*, 446 Mich 298, 333; 521 NW2d 797 (1994). Although we understand a trial court's natural opposition to unnecessary delay, "a general interest in promoting judicial economy and efficiency may not deny the clear mandate of [MCL 768.20a(3).]" *Pickens*, *supra* at 334.

In this case, defense counsel timely initiated efforts to preserve an insanity defense at defendant's arraignment, and counsel properly followed the procedures set forth in MCL 768.20a(3). Defense counsel assiduously apprised the trial court of his efforts to preserve this defense and did not request an adjournment until Dr. Miller expressed a need for neuropsychological testing. See *Pickens*, *supra*. Although the trial court correctly noted that Dr. Daigle had characterized defendant as evasive and uncooperative, other facts contained in Daigle's report suggested that defendant's apparent non-cooperation might have stemmed from mental illness. Dr. Daigle reported that two jail psychiatrists believed defendant to be psychotic or schizophrenic. The trial court failed to articulate any reason for denying defendant's request, other than the firm trial date and its personal skepticism of defendant's insanity defense. Under the circumstances, the trial court's decision constituted an abuse of discretion. *Pickens*, *supra*. Defendant was prevented from presenting his insanity defense, so he adequately demonstrated prejudice. Additionally, the record contains no evidence that defense counsel acted negligently or had sought previous adjournments, so, unlike *Pickens*, *supra*, the trial court's ruling, on the limited record before us, constituted manifest injustice.

However, reversing defendant's convictions and sentences outright is not a remedy that is justified by the circumstances. Cf. *People v Shahideh*, 277 Mich App 111, 121-122; 743 NW2d 233 (2007). In this case, the trial court had no objection to allowing Dr. Miller an opportunity to perform the neuropsychological testing, and its primary concern was with the delay associated with adjourning the trial date. However, the trial court also found that Dr. Miller's report suggested that defendant was less than cooperative. A trial court's finding that a defendant is less than "fully" cooperative in the testing requires the trial court to bar presentation of the insanity defense. MCL 768.20a. Moreover, the trial court's order to proceed with trial, without delay, did not necessarily preempt defendant from actually taking a neurological test and obtaining its results. If the results do not vindicate Dr. Miller's theory that perhaps defendant's particularized memory loss is attributable to insanity rather than indolence, then the trial court

correctly, albeit prematurely, barred the defense. On remand, the trial court should determine whether the testing was ever actually completed, and, if it was completed, ascertain the results of any tests and whether they supported defendant's insanity defense. MCR 6.507(A). This preliminary measure could potentially save the trial court considerable time and energy.

In any event, the proper remedy is to remand this case to the trial court with the instruction that it should afford defendant the relief that he initially sought—an opportunity to have the appropriate testing performed to determine his mental condition at the time of the charged offense. We are not now in a position to determine whether a new trial is necessary, because the claimed error only warrants reversing defendant's convictions and sentences if neurological testing verifies defendant's insanity theory and justifies his apparent reluctance to recall the homicidal events. Therefore, after completion of the appropriate testing, the trial court should conduct an evidentiary hearing to determine if defendant was, in fact, denied his right to present an insanity defense or if the defense was properly barred. This approach comports with the understanding that a decision to grant post-conviction relief, generally, and particularly a new trial, is often best left to the trial judge who has reviewed all the relevant evidence. See *People v Cress*, 468 Mich 678, 691-692; 664 NW2d 174 (2003); MCR 6.502; MCR 6.508(D). The trial court should make an independent determination, on the basis of the new record, whether a new trial is in order. MCR 6.508(E); cf. *Shahideh, supra*. If the trial court finds that the test results support Dr. Miller's tentative insanity theory, then a new trial is warranted. Otherwise, the trial court's original ruling was valid, as are defendant's convictions and sentences. The trial court should make findings of fact and conclusions of law sufficient to enable meaningful review.

We conditionally affirm defendant's convictions and sentences, but remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly