

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL ANTHONY FULBRIGHT,

Defendant-Appellant.

UNPUBLISHED

May 26, 2009

No. 285176

Oakland Circuit Court

LC No. 2007-216756-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant appeals by right his bench trial conviction of first-degree home invasion, MCL 750.110a(2).¹ We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction stems from his physical assault upon his mother in her home. Complainant testified to the following events. She was having coffee with a neighbor when defendant arrived and knocked on her window. Complainant spoke with defendant and told him that she did not want to talk to him. Defendant shouted at complainant and stated that he would talk with her, and went to the back door. As complainant tried to close the door, defendant struck the storm door, causing the glass to separate from the frame. Defendant unlocked the storm door and entered the home. According to the complainant, defendant then began to attack her, and struck her numerous times in the head and face with his fists. When complainant attempted to retreat, he followed her into the dining room where the neighbor was seated. Defendant grabbed complainant's hair and continued to strike her. Complainant tried to grab the neighbor's arm, but defendant grabbed him and "slung" him into the next room. Defendant left the home and complainant called 911 because she thought that her neighbor might need medical assistance. Defendant was later arrested.

Prior to trial, defendant was sent to the Center for Forensic Psychiatry for a competency evaluation. The examiner opined that defendant was competent to stand trial. At a pretrial hearing, the trial court asked defendant and defense counsel whether defendant would like to

¹ Defendant was acquitted of a related charge of malicious destruction of property less than \$200.

have an independent evaluation performed. Defendant replied that an independent evaluation would not be necessary. Defense counsel concurred and stated, “We adopt the report.” The trial court adopted the findings of the report that defendant was competent to stand trial.

Defendant now argues that he was incompetent to stand trial. We review a trial court’s decision concerning a defendant’s competence to stand trial for an abuse of discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). An abuse of discretion occurs when the court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

The subjection of an incompetent defendant to a criminal trial violates that defendant’s right to due process. *Cooper v Oklahoma*, 517 US 348, 354; 116 S Ct 1373; 134 L Ed 2d 498 (1996). Our Legislature has established procedures for determining competency. MCL 330.2020 *et seq.* MCL 333.2020(1) provides:

A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial 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. The 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.

The statute requires that, “a criminal defendant’s mental condition at the time of trial must be such as to assure that he understands the charges against him and can knowingly assist in his defense.” *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003). If a showing is made that a defendant may be incompetent to stand trial, the court must order the defendant to undergo an evaluation at the Center for Forensic Psychiatry or another certified facility. MCL 330.2026(1). The written report prepared by the Center is admissible as evidence in the competency hearing. MCL 330.2030(3). “The defense, prosecution, and the court on its own motion may present additional evidence relevant to the issues to be determined at the hearing.” MCL 330.2030(3). However, “[t]he determination of competency may rest solely on the report of the Center for Forensic Psychiatry if neither the state nor the defendant chooses to offer testimony.” *People v Newton (After Remand)*, 179 Mich App 484, 488; 446 NW2d 487 (1989).

In this case, defendant challenges the accuracy of the competency report, and maintains that it was improperly prepared under MCL 333.2028(1) because there was no indication in the record that the psychologist who prepared the report consulted with defense counsel. Defendant correctly notes that a defendant cannot waive the ultimate issue of whether he is competent to stand trial. See *Pate v Robinson*, 383 US 375, 384-385; 86 S Ct 836; 15 L Ed 2d 815 (1966); *People v Ray*, 431 Mich 260, 270 n 5; 430 NW2d 626 (1988); *People v Whyte*, 165 Mich App 409, 412-414; 418 NW2d 484, (1988). Thus, defendant’s pretrial decision not to seek an independent competency evaluation, and his and trial counsel’s decision to “adopt” the report prepared for the court arguably cannot be read as a waiver of this issue. However, we find that this affirmative action by counsel acts, at a minimum, as a waiver as to the admissibility of the report, and to any challenge concerning the trial court’s ability to rely on the report to make its determination. To find otherwise would essentially allow defendant to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

We do not find the trial court abused its discretion when it determined that defendant was competent to stand trial. Defendant attempts to highlight portions of the report outlining defendant's mental illness to show that he was incompetent to stand trial. However, other portions of the report and the examiner's conclusion do not support his assertion. While defendant might have done better to have taken his attorney's advice and not testified, his trial testimony and behavior did not demonstrate incompetence. Under the circumstances, we find that the trial court did not abuse its discretion in finding defendant competent to stand trial.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

/s/ Douglas B. Shapiro