STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 5, 2010
v	No. 286412 Calhoun Circuit Court
MICHAEL DEVON FISHER, Defendant-Appellant.	LC No. 2007-002805-FC

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

BECKERING, J. (*concurring*).

I concur in the outcome of my colleagues in affirming defendant's conviction. I write separately to express my disagreement with the majority's conclusion regarding the admissibility of defendant's statements to Michelle Keiser and Joel Garza, two employees of Kalamazoo Psychiatric Hospital (KPH).

On December 28, 2006, defendant shot and killed his wife and 12-year-old son in the living room of their home. Afterward, he drove himself to KPH and sought to be admitted. Keiser handled admissions and discharges at the hospital. In addition to obtaining general personal information from prospective patients, Keiser was responsible for inquiring *why* the person wished to be admitted. Keiser met with defendant to ascertain his reason for presenting to KPH. Due to potential safety concerns associated with walk-in patients arriving at KPH in distressed mental states, safety officer Garza was required to be present during the intake meeting with defendant. Keiser and Garza testified that throughout his approximate one-hour stay at KPH, defendant was extremely distraught and crying so forcefully that he had difficulty communicating. When Keiser attempted to determine why defendant sought admission, defendant stated that he wanted to go to sleep and not wake up, that he needed rest, and that he had done something that was unforgivable and beyond redemption.[1] Defendant stated, "Even God can't help me now." Calhoun Community Mental Health did not accept defendant's private insurance, so his request for admission to KPH was denied, and he was advised to go to Borgess Hospital for treatment.[2] Keiser feared defendant would harm himself if left alone, so she helped

[1] Garza testified that defendant asked if the hospital had a medication that could put him to sleep forever, so that he would never wake up.

[2] Keiser testified that in order to approve admissions, she is required to contact the screening
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coordinate his transfer by ambulance to Borgess Hospital and ensured that a bed was available for him upon arrival. Garza assisted in comforting defendant and putting him on a gurney for medical transport.

At trial, the prosecutor elicited from Keiser and Garza the statements defendant made during the course of his attempt to be admitted to KPH. Contrary to the opinion of my colleagues, I would hold that defendant's statements to Keiser and Garza at the time of his request for admission fall within the scope of privileged communications under MCL 330.1700(h), and that no statutory exception to the privilege applies under the circumstances of this case.

Except under certain statutory exceptions, MCL 330.1750(1) explicitly protects privileged communications against disclosure in criminal proceedings and other matters:

> Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.

MCL 330.1700(h) of the Mental Health Code, MCL 330.1001 *et seq*., defines the scope of privileged communications with respect to psychiatric and psychological care as follows:

> "Privileged communication" means a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, **or to another person while the other person is participating in the examination, diagnosis, or treatment** or a communication made privileged under other applicable state or federal law (emphasis added).

While the majority focuses on the non-medical job titles of Keiser and Garza, MCL 330.1700(h) focuses instead on the nature and purpose of the communication. Communications are considered privileged when made to another "person"–without limitation to medically trained or licensed persons—while that person is participating in the examination, diagnosis or treatment of a patient. As such, Keiser's and Garza's job titles are irrelevant. Rather, the pertinent question is whether Keiser (and constructively Garza, who was required by the hospital to be present for security purposes) was participating in the examination, diagnosis or treatment of defendant.

It is undisputed that defendant was seeking admission and treatment at KPH, and that he could not obtain such treatment until he first met with Keiser. Keiser was required to inquire into and ascertain defendant's reason for seeking psychiatric care. She was the liaison between defendant and the off-site licensed psychologist in determining whether defendant could be admitted to KPH.[3] Keiser testified that she routinely documents her observations and

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licensed psychologist at the community mental health agency of the county in which the prospective patient resides.

[3] Keiser's role at KPH is analogous to that of an admissions clerk in an emergency room, to (continued…)

information obtained from prospective patients, and if the person is granted admission to KPH, her notes become part of the patient's medical chart. The only reason Keiser did not admit defendant to KPH was because he did not have the proper form of insurance coverage. Given her concerns that defendant required medical care and was not safe to be left alone, Keiser coordinated his transfer by ambulance to Borgess Hospital. Under these circumstances, I would conclude that Keiser was participating in the examination, diagnosis, and treatment process and that the statements defendant made to her, in the presence of Garza whose attendance was mandatory, fell within the scope of privileged communications under MCL 330.1700(h).

While defendant could have waived the privilege and permitted admission of his statements to Keiser and Garza in furtherance of his claim of insanity under MCL 330.1750(1), he chose not to do so. As such, the next pertinent question is whether any of the statutory exceptions apply that would enable defendant's statements to be disclosed in his criminal trial. MCL 330.1750(2) sets forth the following exceptions to the privilege:

> Privileged communications shall be disclosed upon request under 1 or more of the following circumstances:
>
> (a) If the privileged communication is relevant to a physical or mental condition of the patient that the patient has introduced as an element of the patient's claim or defense in a civil or administrative case or proceeding or that, after the death of the patient, has been introduced as an element of the patient's claim or defense by a party to a civil or administrative case or proceeding.
>
> (b) If the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communications could be used in the proceeding.
>
> (c) If the privileged communication is relevant to a matter under consideration in a proceeding to determine the legal competence of the patient or the patient's need for a guardian but only if the patient was informed that any communications made could be used in such a proceeding.
>
> (d) In a civil action by or on behalf of the patient or a criminal action arising from the treatment of the patient against the mental health professional for malpractice.
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> (e) If the privileged communication was made during an examination ordered by a court, prior to which the patient was informed that a communication made would

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whom we must confide our reason for presentation before being seen by a triage nurse or a doctor. It cannot reasonably be argued that we may have no expectation of privacy through the physician-patient privilege when divulging our personal medical concerns to the person serving as the gatekeeper to such care. See, e.g., *People v Bland*, 52 Mich App 649, 653; 218 NW2d 56 (1974) (physician-patient privilege applied to the defendant's letters to a jail official requesting medical treatment), and McCormick, Evidence (6th ed), § 101 ("the preferable view is that of the courts that have based their decisions upon whether the communication was functionally related to diagnosis and treatment.")

not be privileged, but only with respect to the particular purpose for which the examination was ordered.

(f) If the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial.

The only statutory exception that comes close to the circumstances presented here is MCL 330.1750(2)(a), given that defendant's communications to Keiser were relevant to his physical or mental condition, which defendant introduced as an element of his defense in this case. However, MCL 330.1750(2)(a) applies only in "a civil or administrative case or proceeding," not criminal proceedings. By pleading insanity at trial, defendant did not invoke an automatic waiver of his entitlement to maintain the psychiatrist-patient privilege. See *People v Plummer*, 37 Mich App 657, 660; 195 NW2d 328 (1972), and *People v Wasker*, 353 Mich 447, 450-451; 91 NW2d 866 (1958). As such, I find no basis to except defendant's statements from the statutory protections of MCL 330.1750(1).

While I would hold that the trial court abused its discretion in permitting Keiser and Garza to testify regarding defendant's statements at the time of his presentation and request for admission to KPH, any error was harmless, as there was substantial other evidence of defendant's guilt such that the testimony did not likely undermine the reliability of the verdict in this bench trial. See *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (the standard of review for preserved, nonconstitutional error is whether it is more probable than not that the error in question was outcome determinative).

/s/ Jane M. Beckering