

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE CHARLES GREEN,

Defendant-Appellant.

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UNPUBLISHED

December 16, 2010

No. 294741

Wayne Circuit Court

LC No. 09-014650-FC

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of two counts of felonious assault, MCL 750.82.<sup>1</sup> We affirm, but remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions resulted from his assaults on Lora Curry and Montclair Jones on the evening of May 28, 2009, while the two were spending the night in defendant's home. According to the prosecution, defendant had a fight with complainants about the placement of a space heater. Defendant ordered the two to leave, went upstairs, returned with a baseball bat, and struck complainants while stating that he was going to kill them. The defense maintained that defendant struck complainants in self-defense after Jones had attacked defendant's brother Roderick Lowe, and after Curry had reached into her purse and retrieved a knife and attempted to give it to Jones during the fight. In his opening statement, defense counsel also maintained that defendant called 911 multiple times, that Lowe would testify to this effect, and was prepared to introduce a phone record to substantiate this fact. Counsel further stated that the reason that the police arrested defendant instead of Curry and Jones was because they won the "race to the police."

During trial Curry and Jones testified about their versions of the assault, and Lowe testified on defendant's behalf. In addition, the prosecution elicited the testimony of a police

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<sup>1</sup> Defendant was initially also charged with alternate counts of assault with intent to murder, and assault with intent to do great bodily harm.

witness who was permitted to testify, over defense counsel's objection, that defendant did not make an exculpatory statement to the police while in custody. Despite counsel's objection, the trial court agreed with the prosecution's assertion that defense counsel had "opened the door" to this testimony by his opening statement. On appeal, defendant first maintains that defense counsel rendered ineffective assistance when he "opened the door" to this testimony. He argues that, as a matter of law, no reasonable defense counsel would have claimed that the police investigation was one-sided, knowing that the prosecutor would jump at the chance to show that defendant declined an opportunity to give his version of events.

Defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*<sup>2</sup> hearing before the trial court; therefore, his ineffective assistance of counsel claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id.* at 368. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*

We note that on appeal, defendant does not argue that the use of the silence was improper, only that counsel was ineffective for maintaining during opening statement that the police believed complainants because they won "the race to the police" and thus allowing the introduction of this allegedly highly damaging evidence. Given defendant's specific arguments here, he cannot prevail. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. Defense counsel clearly had a purpose in mind while making his opening statement, including the reference to defendant's 911 calls, and counsel's theory that the police chose to believe complainants' version because they spoke with the police first, i.e., to provide support for the defense theory of self-defense. According to Lowe's testimony, defendant called the police to try to get complainants out of his house when they would not leave. Defendant's theory was that

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

their continued unwanted presence in the home, and their subsequent attack on Lowe, was what caused defendant to attack complainants in self-defense. Thus, defense counsel's statements in furtherance of defendant's chosen defense was strategic. That counsel's strategy did not work did not render its use ineffective assistance. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). In addition, we note that defense counsel appropriately objected, albeit unsuccessfully, to the introduction of the fact defendant did not make a statement while in custody, which had led to the trial court providing a limiting instruction. Under the circumstances, defendant cannot show objectively unreasonable behavior on the part of defense counsel.

Defendant next maintains that the trial court violated his due process rights by precluding defense counsel from cross-examining Curry about the effects of intoxication on her memory and perception of the incident. At trial, defense counsel argued that he should be permitted to question Curry concerning whether she thought her perception was altered by consuming drugs and alcohol, and the trial court appeared to agree with the prosecution's objection that this would constitute an improper conclusion that should be left to the factfinder. This evidentiary issue was thus raised and decided below and is thus preserved. However, defense counsel did not specifically raise this constitutional argument in the trial court. Accordingly, defendant's appellate challenge on this latter ground is not preserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (an objection on one ground is insufficient to preserve an appellate attack on a different ground).

We review defendant's preserved evidentiary issue to determine whether the trial court abused its discretion by limiting the scope of defendant's cross-examination. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). However, because defendant did not raise this constitutional argument in the trial court, we review that unpreserved issue for plain error affecting defendant's substantial rights. *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007).

MRE 611(c) provides:

Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

However, logically relevant evidence may be excluded as "otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court." MRE 402. At trial, the prosecutor's argument concerning the proposed question was based on the assertion that the question whether Curry's intoxication affected her perception of the incident was a conclusion that only the trier of fact could resolve. However, under MRE 701:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Under MRE 701, Curry could form a lay opinion on whether her perception was altered due to alcohol and marijuana consumption, which itself was based on her perception, and such an opinion would certainly be helpful to a clear understanding of a fact in issue, namely the credibility of her recollection of the circumstances surrounding the assaults. Moreover, under MRE 704:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Thus, the fact that the jury would ultimately decide whether Curry's perception of the event was accurate despite her alcohol and marijuana use was not a reason for the trial court to sustain the prosecution's objection. We thus find that the trial court erred in sustaining the prosecution's objection for this reason. Nor was this, as the prosecution represents on appeal, merely cumulative evidence to the remainder of Curry's testimony.

However, defendant is not entitled to relief based on the trial court's error.

In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. See *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), citing *Lukity*, *supra* at 495-496. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. See *Lukity*, *supra* at 495; *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). [*People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).]<sup>3</sup>

Here, while defense counsel was not permitted to question Curry as to whether she felt that her perceptions were altered by her alcohol and marijuana use that day, counsel was permitted to question Curry extensively about the amount of alcohol and marijuana that she had consumed, and she had already testified that she agreed with counsel's assertions that using alcohol or illegal drugs "could alter your perception of reality or impair your judgment." And while defendant maintains on appeal that Curry would have likely agreed that her perception was actually affected by her alcohol and drug use, we find it just as likely that Curry would have answered that her perception was not impaired. We thus cannot say that the lack of an answer was prejudicial under these circumstances.

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<sup>3</sup> As noted above, this is similar to the burden defendant must show if this issue is reviewed as an unpreserved constitutional error. For the reasons stated below, we find that defendant is not entitled to relief under this alternate standard of review.

Defendant has filed a supplemental brief raising an additional issue alleging an inaccuracy in the presentence report that would require resentencing. In reply, the prosecutor admits that the presentence report may be inaccurate. Accordingly, we remand the matter to the trial court to determine whether the presentence report is, in fact, inaccurate with respect to defendant's prior convictions. If the trial court determines that the presentence report did contain inaccurate information, it shall proceed to resentence defendant in light of the correct information.

Defendant's convictions are affirmed, but the matter is remanded to the trial court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ David H. Sawyer

/s/ Peter D. O'Connell