

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 18, 2012

v

JOSEPH KERLIN LONG,

Defendant-Appellant.

No. 303430
Wayne Circuit Court
LC No. 10-011368-FC

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant Joseph Kerlin Long of assault with intent to do great bodily harm less than murder in violation of MCL 750.84, in connection with his attack of his brother, Brian Long (Long). Contrary to defendant’s contention, the circuit court did not violate his right to confront the witnesses against him, or contravene the rules of evidence, by admitting Long’s medical records without requiring the preparing physician to appear. Further, defendant waived his right to be present during a short portion of the trial and therefore the circuit court did not err in proceeding in his absence. As such, we affirm defendant’s conviction and sentence.

Defendant moved in with Long after losing his house. When Long evicted him after a month in residence, defendant attacked Long with an 8- to 12-inch kitchen knife. Long testified that defendant stabbed him in the back and legs. Long’s medical records showed that he presented with multiple stab wounds and bite marks to his legs, torso, and wrists. Physicians decided against suturing Long’s wounds and treated him with antibiotics.

I. MEDICAL RECORDS

Defendant contends that the circuit court violated the hearsay rule and his constitutional right to confront the witnesses against him by admitting Long’s medical records without the accompanying testimony of the preparing physician. During the testimony of the officer in charge of the investigation, the prosecutor moved for the admission of Long’s medical records under MRE 803(6), records of a regularly conducted business activity. Defense counsel objected because the prosecutor did not “intend to call anybody to testify to these records, and we have no way of cross-examining any of the doctors’ notes” The prosecutor rebutted that defense

counsel could have called the doctor who prepared the records¹ and asserted that the prosecution was not required to call such a witness as long as the records were certified pursuant to MRE 902(11). The circuit court admitted the evidence over defendant's objection. The records describe the location and nature of Long's injuries. They indicate that hospital staff cleaned and bandaged the wounds, the deepest of which was four inches. Medical personnel discharged Long the following day with a prescribed course of antibiotics and instructions to regularly change his bandages.

We generally review a trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "Whether the admission of [evidence] violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo." *Fackelman*, 489 Mich at 524. The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with all witnesses against him" US Const, Am VI; see also Const 1963, art 1, § 20. It precludes the admission of testimonial statements as substantive evidence absent the opportunity to challenge the declarant face-to-face. *Fackelman*, 489 Mich at 528. A statement is testimonial in nature if it is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (alteration in original) (quotation marks and citation omitted).

The admission of a patient's medical records involves hearsay within hearsay. *Merrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998). The records themselves must fall within the hearsay exception of MRE 803(6), records of regularly conducted business activity, to be admissible. *Merrow*, 458 Mich at 626; *People v McLaughlin*, 258 Mich App 635, 651-652; 672 NW2d 860 (2003). Hearsay statements within the medical records must fall into a hearsay exception as well. *Merrow*, 458 Mich at 626.

MRE 803(6) excepts from the exclusionary hearsay rule a record or report "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity." To show that the report was made as a regular practice of the business, the proponent must present "testimony of the custodian or other qualified witness" or certify the record. *Id.* To certify a record of a regularly conducted business activity, the proponent must present an affidavit from the record's custodian containing the information delineated in MRE 902(11). The prosecutor presented an affidavit certifying Long's medical records and therefore their admission generally did not pose a hearsay problem under MRE 803(6). Nor did the statements of Long within the medical records violate the hearsay prohibition. Those statements were necessary to seek medical treatment and therefore fell within the exception of MCR 803(4).

¹ Our Supreme Court has rejected that a prosecutor's violation of a defendant's confrontation right could be excused simply because the defendant has the power to subpoena the witness. *People v Fackelman*, 489 Mich 515, 529 n 7; 802 NW2d 552 (2011). See also *Bullcoming v New Mexico*, __ US __; 131 S Ct 2705, 2718; 180 L Ed 2d 610 (2011); *Melendez-Dias v Massachusetts*, 557 US 305, 324; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

However, “the rules of evidence cannot override the Sixth Amendment and cannot be used to admit evidence that would otherwise implicate the Sixth Amendment.” *Fackelman*, 489 Mich at 545. See also *Crawford*, 541 US at 54 (“The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”). The admission of a testimonial medical record or a medical record containing testimonial statements can violate a defendant’s confrontation right despite the hearsay exception. *Fackelman*, 489 Mich at 550.

In *Fackelman*, the trial court admitted into evidence testimony about the defendant’s diagnosis, which was derived from the defendant’s medical records. The defendant’s son had been killed in an automobile accident, and the defendant “perceived [the other driver] as insulting and antagonizing to his family” during his vehicular manslaughter trial. *Id.* at 519. The defendant broke into the other driver’s home, attacked him, and then went into hiding. A family friend found the defendant and, given his precarious emotional state, attempted to drive him to the hospital. Police arrested the defendant before the pair reached the hospital, but defense counsel arranged for the defendant’s commitment to a psychiatric intensive care unit before the officers could question him. *Id.* at 520. The examining psychiatrist opined in his records that the defendant suffered from “major depression, single episode, severe without psychosis.” *Id.* at 530. At trial, the defendant claimed to have been legally insane at the time of the offense. The prosecutor did not present the examining psychiatrist as a witness, nor did he move for the admission of the medical records. *Id.* at 528. The defendant presented the testimony of an expert witness who relied on the examining psychiatrist’s report in reaching that opinion. The prosecution rebutted with its own expert who, relying on the same report, opined that the defendant was not insane. *Id.* at 521.

The Supreme Court held that the trial court violated the defendant’s right to confront the witnesses against him by admitting the expert witness’s opinions, which were wholly based on the diagnosis in the medical records, without requiring the presentation of the examining psychiatrist. The Court concluded that the examining psychiatrist was a witness against the defendant. The defendant did not deny committing the offense and the only real issue for trial was whether the defendant was legally insane at the time he attacked the victim. In the medical records, the examining psychiatrist assessed the defendant’s mental state contemporaneous with the offense and stated his belief that the defendant was only depressed, not psychotic. *Id.* at 529-530. Thus, the prosecutor used the psychiatrist’s statements to prove the truth of the matter asserted—that the defendant was not legally insane at the time of the attack. *Id.* at 530. The Court further concluded that the challenged statements were testimonial as to the defendant’s mental condition because they were the psychiatrist’s “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* at 532. Finally, the Court held that the psychiatrist’s report “was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” because

- (1) defendant’s admittance to the hospital was arranged by lawyers, (2) defendant was arrested en route to the hospital, (3) the report noted that the Monroe County Sheriff requested notification before defendant’s discharge, (4) defendant referred to a trial and to a gun in his responses related in the report, and, perhaps most significantly, (5) at its very beginning and ending, in which its overall context is

most clearly identified, the report expressly focused on defendant's alleged crime and the charges pending against him. [*Id.* at 532.]

Accordingly, the Court concluded, an "objective [psychiatrist] would reasonably [be led] to believe that [his statements] would be available for use at a later trial." *Id.*, citing *Crawford*, 541 US at 51 (quotation marks omitted).

The scenario before us is inapposite of *Fackelman*. The medical personnel who created the challenged records were attending Long on an emergency basis. Their goal was to assess and treat Long's wounds and to accomplish that goal, they needed to ascertain the mechanism of his injury. In this regard, this case is akin to *People v Jordan*, 275 Mich App 659, 664; 739 NW2d 706 (2007), in which this Court held that a victim's statements in response to a pseudo-police interrogation were nontestimonial because they were "necessary to obtaining or providing emergency medical care." And the doctors' and nurses' statements in the medical records were not solemn declarations or affirmances made to prove some fact, nor were they used in that fashion during defendant's trial. Rather, the records were simply recorded observations and notes to assist in the provision of care. See *Melendez-Diaz*, 557 US at 324 ("Business and public records are generally admissible absent confrontation . . . because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact – they are not testimonial."); *id.* at 312 n 2 ("medical records created for treatment purposes" are generally not testimonial). The doctors were certainly aware that a crime had occurred—Long told them that defendant had stabbed him and investigating officers questioned Long at the hospital. But the records do not state the examining doctors' opinions regarding whether Long was actually stabbed with a knife, the true size of the knife, or who stabbed him.

As records created in response to Long's acquisition of emergency medical treatment, we find the reasoning of *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), more applicable to analyze whether Long's medical records were testimonial. *Davis* involved a victim's statements made to a 911 operator during and immediately after an incident of domestic violence and to the two police officers who responded to her call. *Id.* at 817-818. The Supreme Court described the difference between testimonial and nontestimonial statements as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Id.* at 822.]

The emergency room staff in this case were acting "to meet an ongoing emergency"—a bleeding patient with multiple lacerations on his body. They were not trying to prove that anyone had stabbed Long or to prove any past event to be used at a later criminal prosecution. Their observations in the medical records were therefore not testimonial in nature. Accordingly, we conclude that the circuit court did not err in admitting Long's medical records into evidence even without the doctors being presented at trial.

There are some testimonial statements within Long's medical records, however. Long's statements to the doctors identifying defendant as his attacker and indicating that he did not fear further violence because defendant had been arrested were unnecessary to secure emergency medical care or to acquire adequate treatment. They were directed at affirmatively identifying a perpetrator. However, the admission of Long's statements from the medical records did not violate defendant's right of confrontation because defendant actually had the opportunity to confront Long when he testified at trial.

II. RIGHT TO BE PRESENT AT TRIAL

In a brief filed *in propria persona* pursuant to Supreme Court Administrative Order 2004-6 Standard 4, defendant claims that he was denied his statutory and constitutional right to be present at trial. After defendant testified on his own behalf, he was returned to a holding cell during a 36-minute recess. Following the recess, defense counsel informed the court that he had "just been advised by your deputies that the client does not wish to appear in court, so I will waive his presence. This is what the officers have advised me, that he does not wish to come out." Deputy Eric Eskildsen confirmed, "I have informed the client to come out and continue his court proceedings. He said he does not want to. I asked him again. I said, You have to come out in the court. He says, I'm not coming out." The court simply responded, "All right. Given that, we'll call in the jury." In defendant's absence, the prosecutor recalled the officer in charge of the investigation to rebut defendant's testimony, presented into evidence defendant's bloody clothing from the day of the incident, and played a DVD recording of defendant's police interview for the jury. The jury was given no explanation regarding defendant's absence.

A criminal defendant has a due process right to be present during his criminal proceedings "whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge." *United States v Gagnon*, 470 US 522, 526-527; 105 S Ct 1482; 84 L Ed 2d 486 (1985), quoting *Snyder v Massachusetts*, 291 US 97, 105-106; 54 S Ct 330; 78 L Ed 674 (1934). This right is also statutorily protected in Michigan. MCL 768.3 ("No person indicted for a felony shall be tried unless personally present during the trial . . ."). A defendant's absence from a part of the trial, however, is not grounds for automatic reversal. Rather, the defendant must establish a "reasonable probability of prejudice" to merit relief. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977) (quotation marks and citation omitted).

The right to be present during the trial may also be waived. Only the defendant can waive his due process right to be present at his or her felony trial; defense counsel cannot waive the right on a defendant's behalf. *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). The defendant need not specifically state that he waives the right to be present; the defendant may also waive the right through his conduct in the courtroom or his failure to appear. *Id.*; *People v Gross*, 118 Mich App 161, 165; 324 NW2d 557 (1982). As noted by the Court of Appeals for the Second Circuit, a criminal defendant may waive his right to be present "by voluntarily and deliberately absenting himself from the trial without good cause." *United States v Pastor*, 557 F2d 930, 933 (CA 2, 1977). If a defendant "voluntarily absent[s] himself from the proceedings," the court may weigh the burdens on the court, the prosecution, the witnesses and the jury and decide to proceed in the defendant's absence. *Id.* at 934.

Contrary to defendant's assertion, the circuit court did not allow defense counsel to waive defendant's right to be present. After defense counsel attempted to exceed his authority by stating that he waived defendant's right to be present, the court accepted a statement from the court deputy regarding defendant's unwillingness to return to the courtroom. The court's decision to proceed in defendant's absence was based on the deputy's statement that defendant voluntarily chose to absent himself from the courtroom, not on counsel's purported waiver.

The circuit court should have inquired into defendant's reasons for refusing to reenter the courtroom and stated its ground for proceeding without defendant on the record. However, the circuit court's failure does not warrant reversal. On appeal, defendant concedes that he voluntarily chose not to return to the courtroom when directed by the deputy. Defendant claims that he was too upset to return so shortly after testifying, emotions he claims were intensified due to his preexisting mental instability. Yet, defendant did not inform the deputy of his need for a longer recess. Moreover, the trial judge had control over the proceedings and acted to "avoid needless consumption of time." MRE 611(a). Defendant willfully chose not to appear and thereby waived his right to be present.

Defendant also has not established a reasonable probability of prejudice from his absence. While defendant generally claims that he could have assisted his counsel's cross examination of the rebuttal witness, he cites no examples of the queries he would have prompted. And, while the court should have provided some instruction to the jurors so they were not left to speculate about his absence, defendant fails to suggest how the court could have characterized his voluntary absence.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Donald S. Owens

/s/ Mark T. Boonstra