

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE SCOTT, JR.,

Defendant-Appellant.

UNPUBLISHED

October 9, 2012

No. 303671

Wayne Circuit Court

LC No. 10-009332-FC

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of kidnapping, MCL 750.349, three counts of first-degree criminal sexual conduct, MCL 750.520b, and assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to 270 to 420 months' imprisonment for each offense. Defendant appeals as of right. We affirm.

This case arose from a horrific kidnapping and assault of the victim, who was attacked in Detroit as she was attempting to perform her work as a mover. The victim incurred numerous physical injuries in the assault; they included, but were not limited to, two broken legs, a concussion, and fractured ribs.

I. WAIVER OF RIGHT TO A JURY TRIAL

First, defendant contends that the waiver of his right to a jury trial was not valid. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defendant did not raise the issue of an invalid jury waiver in the trial court and the trial court did not address or decide the issue; therefore, it is unpreserved. While "[t]he adequacy of a jury trial waiver is a mixed question of fact and law," *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009), this Court reviews "[u]npreserved claims of constitutional error . . . for plain error affecting substantial rights." *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011).

MCR 6.402 governs the waiver of a jury trial by a defendant.¹ It provides:

(A) Time of Waiver. The court may not accept a waiver of trial by jury until after the defendant has been arraigned or has waived an arraignment on the information, or, in a court where arraignment on the information has been eliminated under MCR 6.113(E), after the defendant has otherwise been provided with a copy of the information, and has been offered an opportunity to consult with a lawyer.

(B) Waiver and Record Requirements. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. [MCR 6.402.]

Defendant argues that his waiver of his right to a jury trial was not valid because he was never arraigned. The court rule clearly provides that the trial court may not accept a waiver until the defendant has been arraigned or waived arraignment. MCR 6.402(A). A hearing titled “Arraignment” was held on September 10, 2010, and the register of actions also indicates that an “Arraignment On Information” was held on that date. However, at the hearing, after trial counsel informed the trial court that the parties were there for an arraignment, the remainder of the discussion involved whether there would be a plea, setting a trial date, evidence, and setting another date to meet.

“The purpose of an arraignment is to provide formal notice of the charge against the accused.” *People v Waclawski*, 286 Mich App 634, 704; 780 NW2d 321 (2009). “At an arraignment, the information is read to the accused and the accused may enter a plea to those charges.” *Id.* “The accused may waive the reading of the formal charges” *Id.* MCR 6.113 governs arraignment and provides, in part:

(A) Time of Conducting. Unless the defendant waives arraignment or the court for good cause orders a delay, or as otherwise permitted by these rules, the court with trial jurisdiction must arraign the defendant on the scheduled date. The court may hold the arraignment before the preliminary examination transcript has been prepared and filed. Unless the defendant demonstrates actual prejudice, failure to hold the arraignment on the scheduled date is to be deemed harmless error.

(B) Arraignment Procedure. The prosecutor must give a copy of the information to the defendant before the defendant is asked to plead. Unless waived by the defendant, the court must either state to the defendant the substance

¹ A comment accompanying the rule indicates that the court rule supersedes the statute requiring a written waiver, MCL 763.3. 1989 Staff Comment to MCR 6.402, citing MCR 6.001(E).

of the charge contained in the information or require the information to be read to the defendant. If the defendant has waived legal representation, the court must advise the defendant of the pleading options. If the defendant offers a plea other than not guilty, the court must proceed in accordance with the rules in subchapter 6.300. Otherwise, the court must enter a plea of not guilty on the record. A verbatim record must be made of the arraignment.

(C) Waiver. A defendant represented by a lawyer may, as a matter of right, enter a plea of not guilty or stand mute without arraignment by filing, at or before the time set for the arraignment, a written statement signed by the defendant and the defendant's lawyer acknowledging that the defendant has received a copy of the information, has read or had it read or explained, understands the substance of the charge, waives arraignment in open court, and pleads not guilty to the charge or stands mute.

Based on the transcript of the proceeding, the trial court did not state the substance of the charges and the information was not read. See *Waclawski*, 286 Mich App at 704, and MCR 6.113(B). Defendant did not waive the reading of the charges. See *Waclawski*, 286 Mich App at 704, and MCR 6.113(C). Nor did defendant enter a plea. See *Waclawski*, 286 Mich App at 704, and MCR 6.113(B). Therefore, defendant was not "arraigned," nor did he waive an arraignment, before the trial court accepted his waiver of the right to a jury trial. MCR 6.402(A). The failure to comply with MCR 6.402(A) was "plain error." *Jackson*, 292 Mich App at 594. However, defendant has failed to show prejudice, or that the acceptance of defendant's waiver of a jury trial without arraignment "affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has not argued that he was unaware of the charges against him when he waived his right to a jury trial. Moreover, reversal is not warranted because the error did not result in the conviction of an innocent defendant or seriously affect the fairness of the trial. *Id.* at 763-764.

Defendant also argues that his waiver of his right to a jury trial was not valid because the trial court failed to comply with MCR 6.402(B). A defendant has the right to a trial by jury, but he may waive the right "with the consent of the prosecutor and the approval of the trial court" *Cook*, 285 Mich App at 422. The waiver must be "knowingly and voluntarily made." *Id.* Compliance with MCR 6.402(B) creates a presumption that the waiver was knowing, voluntary, and intelligent. *Cook*, 285 Mich App at 422-423.

The trial court complied with the requirements of MCR 6.402(B). First, the trial court advised defendant "in open court of the constitutional right to trial by jury." MCR 6.402(B). The trial court stated: "But you know what kind of trials you have. You can have a trial where there's a jury that makes a decision about what the evidence shows or you can have me make a decision about what the evidence shows." The trial court also addressed defendant personally and ascertained that he understood the right and voluntarily chose to give up the right. MCR 6.402(B). The following colloquy occurred:

THE DEFENDANT: Yeah. I want to go with you.

THE COURT: Now, that's your decision to make. You can take everybody's advice in the world, but you get to make the decision. So, what do you want to do?

THE DEFENDANT: I'll go with you.

THE COURT: Okay. Has anybody forced you to do that, give up your rights to go to trial?

THE DEFENDANT: No. No. I'd rather, I'd rather take a bench trial.

The trial court also asked defendant whether he had any questions and, thereafter, the parties discussed the date of the trial. Finally, a verbatim record was made of the proceeding. MCR 6.402(B). Therefore, the waiver is presumed to be knowing, voluntary, and intelligent. *Cook*, 285 Mich App at 422-423. Accordingly, there was no “plain error.” *Jackson*, 292 Mich App at 594. Even if we were to find plain error, defendant has again failed to show prejudice—that the failure to comply with the court rule affected the outcome of the trial—or that reversal is warranted. See *Carines*, 460 Mich at 763-764.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant contends that the trial court erred in finding that he was not denied the effective assistance of counsel. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. A defendant must also show that the result that did occur was fundamentally unfair or unreliable. [*People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) (citations omitted).]

“[B]oth the performance and prejudice components of the ineffectiveness inquiry involve mixed questions of fact and law.” *People v Gioglio (On Remand)*, 296 Mich App 12, 19; 815 NW2d 589 (2012). “This Court reviews de novo, as a question of constitutional law, the determination that a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the defendant's trial.” *Id.* at 19-20. “[W]hen, as here, the trial court has conducted a *Ginther*² hearing to resolve factual disputes concerning the conduct of the lower court proceedings, this Court will review the trial court's findings for clear error.” *Id.* at 20. “The clear-error standard is highly deferential; an appellate

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

Court will only determine that a trial court's finding is clearly erroneous when, after a review of the entire record, it is left with the definite and firm conviction that the trial court has made a mistake." *Id.* at 20-21.

Defendant argues that his trial counsel was ineffective in failing to interview Carl Scott,³ an endorsed *res gestae* witness; failing to demand Scott's production at trial; and failing to demand a due-diligence hearing. This Court remanded for a due-diligence hearing and the trial court found that trial counsel was not ineffective. Although the trial court did not explicitly address the failure to interview, we review this claim "for errors apparent on the record." *Lockett*, 295 Mich App at 186. "We review a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).⁴

"Defense counsel's decision regarding which witnesses to call is presumed to be sound trial strategy." *People v Meissner*, 294 Mich App 438, 460; 812 NW2d 37 (2011). "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'" *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citations omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (internal citation and quotations marks omitted). "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Trial counsel became aware of Scott at the preliminary examination when the victim pointed to him in the courtroom. Trial counsel may have briefly spoken with Scott in the hallway, but, thereafter, he did not further attempt to contact or communicate with Scott. Counsel believed that the prosecution had made efforts to find Scott. Based on this information, counsel believed Scott's testimony would not be favorable. In addition, and significantly, trial counsel asked defendant about Scott and defendant told trial counsel not to worry about him and that he was an alcoholic. Trial counsel's failure to further investigate or interview Scott was objectively reasonable based on trial counsel's discussion with defendant. See *Lockett*, 295 Mich App at 187. Based on defendant's statements, trial counsel reasonably believed that defendant did not want to call Scott as a witness. Based on defendant's statements and trial counsel's belief that Scott's testimony would not be favorable, trial counsel's failure to demand production of Scott or demand a due-diligence hearing was objectively reasonable. See *Lockett*, 295 Mich App at 187. Counsel's conduct was also reasonable because, as discussed below, the prosecution exercised due diligence, and trial counsel is not required to make futile objections. See *McGhee*, 268 Mich App at 627.

³ We will refer to Carl Scott as simply "Scott" in this opinion.

⁴ "If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Eccles*, 260 Mich App at 388.

If we were to find that trial counsel's conduct was not objectively reasonable, we would be required to consider whether there is a reasonable probability that, but for counsel's error, the result of the trial would have been different. See *Lockett*, 295 Mich App at 187. Given the prosecution's efforts to find Scott for trial, it is unlikely that trial counsel would have found Scott to interview or call as a witness, even if he had tried. There was evidence that Scott had a "CCH" (computerized criminal history) for murder and may not have wanted to talk to the police. In addition, the trial court did not abuse its discretion in concluding that the prosecution exercised due diligence in attempting to find Scott. See *Eccles*, 260 Mich App at 389. "[D]ue diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness." *Id.* at 391, citing *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). At the preliminary examination, the prosecutor gave Scott her business card and asked him to contact her. When the prosecution did not hear from Scott, an investigator attempted to contact him. Efforts included going to Scott's house more than once, talking with people who lived there, leaving a subpoena, and going to a place he frequents and leaving a business card with a person there. The prosecutor also checked hospitals, obtained Scott's criminal history, and asked the investigator to check if Scott was receiving benefits. In light of the record, the trial court's findings regarding due diligence were not clearly erroneous. *Gioglio (On Remand)*, 296 Mich App at 20.

III. TRIAL COURT'S FINDINGS

Finally, defendant contends that the trial court's findings of fact were clearly erroneous. We disagree. Specifically, defendant argues that the trial court used impeachment evidence as substantive evidence, diminished the prosecution's burden concerning the element of identification, and did not fairly weigh the credibility of the victim. As a result, defendant contends, the trial court did not correctly apply the law to the facts.

"We review a trial court's factual findings for clear error." *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008), quoting *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

First, defendant claims that the trial court improperly used the victim's prior inconsistent statement to establish identity, thereby reducing the prosecution's burden concerning this element. "[P]rior unsworn statements of a witness are mere hearsay and are generally inadmissible as substantive evidence." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). At trial, the victim testified that she had never seen defendant before the incident and did not know defendant on that day. However, Officer Robert Kane testified that the victim told him that she had seen the perpetrator three or four times before the incident. Defendant testified at trial that he had met the victim in 2008 and brought her to his house. The trial court stated, in part:

As I had indicated before, you know, identification deals with, as we're familiar with, prior knowledge of a person. One report says that she had seen him four or five times before. One report says that, you know, she had never seen him before. And Mr. Scott's version is that he had brought her to the house before.

So, I don't think by anybody's argument we could say that he was not known to her.

She says, you know, I had seen him. He says I brought her there. So, that makes it less of a problem to try to line up how a person describes somebody and knowing the person that they're trying to describe, you know.

Based on these paragraphs, the trial court may have relied on the victim's prior inconsistent statement in finding that she did know defendant. However, the trial court could have found the victim's trial testimony on this point not credible based on her prior inconsistent statement and instead believed defendant's statement. "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Moreover, a trial judge in a bench trial is presumed to know the applicable law. *People v Sherman-Huffman*, 466 Mich 39, 43; 642 NW2d 339 (2002); see also *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992) ("[u]nlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel"). Thus, the trial court's finding that the victim knew defendant was not clearly erroneous,⁵ and the trial court did not diminish the prosecution's burden of proof with regard to the element of identity.

In addition, and contrary to defendant's argument, the trial court's finding that identity was established was not clearly erroneous. *Garland*, 286 Mich App at 7. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The lack of a motive to wrongly accuse defendant made the victim's identification of him stronger. The trial court also found that the victim identified defendant after the incident and never identified anyone else, and these findings were not clearly erroneous. Additionally, the victim's description of defendant's having a cane also supported her identification of defendant. Finally, even if the victim's descriptions of her assailant seemed to vary, the trial court could have believed her testimony at trial clarifying that at a previous time she was describing the other perpetrator.

Defendant also argues that the trial court did not question the victim's credibility in its findings of fact. Specifically, with regard to the sexual assault, defendant argues that the trial court ignored the victim's inconsistent versions of the sexual assaults and the lack of any DNA evidence or trauma. With regard to a court's findings, "[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). "If the trial court was aware of the issues in the case and correctly applied the law to the facts, its findings are sufficient." *Lanzo Constr Co*, 272 Mich App at 479.

⁵ Even if the trial court did use the victim's prior statement as substantive evidence, the statement was essentially duplicative of defendant's testimony that he knew the victim. Accordingly, any error would be harmless.

In making its findings, the trial court did weigh the victim's credibility. The trial court considered the victim's state after the incident and found that it would have been difficult for her to tell the police what happened. The trial court rejected the victim's claim that there was a gun, finding no corroborating evidence and that a gun had not been consistently mentioned. The trial court, however, found evidence to support some of her claims. The trial court found that the victim knew where the incident occurred and identified the person who saved her, which suggested that "she had a good ability to recall." Thus, while the trial court did not specifically address the victim's allegedly inconsistent versions of the assaults, it acknowledged that she would have had difficulty describing the events after they happened and apparently believed her trial testimony about the crimes. With regard to the lack of trauma, the trial court acknowledged that, based on the victim's description, it seemed that there would be "internal injury," yet the court did believe she was sexually penetrated in some fashion. The trial court also found that she had been cleaned with bleach.⁶ The court's findings were sufficient under MCR 2.517(A)(2). Moreover, because "the trial court was aware of the issues in the case and correctly applied the law to the facts," its findings were sufficient. *Lanzo Constr Co*, 272 Mich App at 479. We find no clear error and no basis for reversal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

⁶ This cleaning may have contributed to a lack of DNA evidence.