STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY DUANE LAUTNER,

Defendant-Appellant.

UNPUBLISHED
December 29, 2005

No. 257355
Kalkaska Circuit Court
LC No. 03-002373-FC

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury verdict of guilty on eleven offenses arising out of a crime spree that occurred on March 15, 2003. The convictions were for (1) unlawfully taking possession of a motor vehicle and driving it away, MCL 750.413, (2) third-degree fleeing and eluding, MCL 257.602a(3), (3) assault with the intent to commit great bodily harm less than murder, MCL 750.84, (4) carrying or possessing a firearm while committing or attempting to commit the felony stated in count three (felony-firearm), MCL 750.227b, (5) first-degree home invasion, MCL 750.110a(2), (6) armed robbery, MCL 750.529, (7) carjacking, MCL 750.529a, (8) felony-firearm during the commission of either or both of counts 6 and 7, MCL 750.227b, (9) assault with the intent to commit murder, MCL 750.83, (10) carjacking, MCL 750.529a, and (11) felony-firearm during the commission of either or both of counts 9 and 10, MCL 750.227b. Defendant was sentenced as a habitual offender (second felony), see MCL 769.10, to the following periods of imprisonment: 36 to 90 months for count 1, 36 to 90 months for count 2, 30 to 72 months for count 3, two years for count 4, 14 to 30 years for count 5, 20 to 40 years for count 6, 20 to 40 years for count 7, two years for count 8, 20 to 40 years for count 9, 20 to 40 years for count 10, and 2 years for count 11. Count 3 was to run consecutive to count 4 and counts 6 and 7 were to run consecutive to count 8. Count 9 was to run consecutive to count 10, which in turn ran consecutive to count 11. Finally, counts 1, 2 and 5 were ordered to run concurrent to each other and each felony-firearm sentence, but consecutive to counts 3, 6, 7, 9 and 10. In addition, defendant was ordered to make payments totaling $13945.03.

I.

Defendant first argues that he did not have effective assistance of counsel. A criminal defendant has the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). When evaluating a claim of ineffective assistance of counsel under either the

Sixth Amendment of the United States Constitution, or under the equivalent provision of the Michigan Constitution, Michigan courts must examine the standards established in *Strickland*. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999), citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). To establish ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). That is, defendant must show that counsel's error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Furthermore, because defendant did not raise this issue before the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).[1]

A.

Defendant first contends that his trial counsel's decision to argue that defendant could not conform his conduct to the requirements of the law rather than that defendant lacked the substantial capacity to appreciate the nature and quality or the wrongfulness of his conduct constituted an unreasonable departure from professional standards, which caused the jury to reject defendant's insanity defense. We disagree.

Defendant waived this claim of error. After defendant's trial counsel concluded the main body of his closing argument, the trial court gave the jury a break to discuss various matters with the parties. While the jury was out of the courtroom, the following exchange occurred:

> The Court: You don't wish to make your own closing argument [referring to defendant]?
>
> Mr. Lautner: I do not.
>
> The Court: All right. You're satisfied obviously with Mr. Slocombe's argument?
>
> Mr. Lautner: Yes.

Because defendant stated on the record that he was satisfied with the argument his trial counsel presented to the jury, defendant waived his right to seek appellate review of the propriety of his trial counsel's closing argument. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Even if defendant did not waive this claim of error, defendant has failed to overcome the presumption that his trial counsel's decision to argue that defendant was unable to conform his conduct to the requirements of the law was anything other than sound trial strategy.

[1] Defendant did move this Court for a remand on this issue, but this Court denied the motion. See *People v Lautner*, unpublished order of the Court of Appeals, entered May 19, 2005 (Docket No. 257355).

At trial, defendant's theory of the case centered on an insanity defense. Defendant asserted that he was acting under the belief that God was directing his conduct through the use of various signs. He further claimed that his primary motivation on the day the offenses occurred was to get the police officers to chase him, engage him in a shootout, and kill him.

Under MCL 768.21a(1), "[i]t is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense." An individual is insane if, as a result of mental illness or being mentally retarded, "that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." *Id.* At trial, both defendant's expert and plaintiff's expert concluded that defendant was mentally ill on the day defendant committed the acts leading to the charges against him.[2] The only issue in contention was whether defendant's mental illness met the additional requirements that defendant lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." *Id.*

At trial, defendant's expert in forensic psychology, Dr. Steven Norris, testified that, while defendant was able to conform his conduct to the requirements of the law, because defendant was under the delusion that God directed his actions, he did not appreciate the wrongfulness of his conduct. On cross-examination, the prosecutor repeatedly noted examples of defendant's behavior that appeared to be inconsistent with Norris' conclusions. Norris stated that the fact that defendant knew how people would react did not alter his opinion that defendant could not appreciate the wrongfulness of his conduct. He explained,

> Yes, in terms of – that's part of it, you know, that this was – he's going to be judged for this, there's going to be these kind[s] of consequences. But in my opinion he still thought that this is what he had been directed, you know, by God to do and was the right thing to do. Still, he knew that people would react this way, that there would be these kinds of repercussions by society and so on.

In addition to the evidence that defendant understood the wrongfulness of his conduct, the prosecutor placed much weight on the fact that defendant's actions did not seem to comport with his stated motive that he was on a suicide mission on the day in question. When the prosecutor questioned Norris about defendant's suicide plans and noted that the events of the day presented numerous opportunities for defendant to get himself killed, Norris admitted that defendant "did not commit suicide or set himself up definitively to be killed when he could have."

To rebut Norris' testimony, plaintiff called its own expert, Dr. Charles Clark. Clark testified that defendant's use of deceit, subterfuge and force indicated a clear awareness that he

[2] Mental illness is defined as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g).

understood that what he was doing was wrong. Clark used the home invasion and theft of Benjamin Flynn's truck to explain this logic.

> If [defendant] had believed that he had a legitimate right to this, that there was nothing wrong with it, there would be no presumed reason to use force or threat in order to secure the truck. He didn't do that. He said he included the shotgun for compliance, indicating again, a clear awareness that the Flynn[]s would not comply if he was to walk into their house and simply demand the keys to the truck.

Clark further disregarded defendant's claim that he wasn't thinking about whether his actions were right or wrong under the law, but rather "was following God's law."

> The actions actually suggest rather strongly that he was thoroughly focused on the law and the illegality of what he was doing. The whole claim he made, and I'll put it in those terms, it was a claim that the purpose of this trip, this chase was to commit suicide by cop, it is a claim that is – that has as it's basis an awareness that the cops will shoot at you if you're doing something illegal. So, he had to know that what he was doing was illegal. He had to appreciate that what he would be doing would be seen as wrong in order to obtain what he claimed he wanted, namely to get shot by the cops.

Clark also found it significant that defendant told an officer shortly after he was arrested that he would likely be charged with attempted murder. Clark said, "That's a clear indication that at that moment he understood . . . how that act was viewed by society, by the law. . . . It's insight; it's awareness of how others see his behavior." From this, Clark concluded that defendant "did not lack that substantial ability to appreciate the nature, and quality, and wrongfulness of his acts."

Clark also opined that the evidence indicated that defendant was also capable of conforming his conduct to the requirements of the law. Clark noted that defendant's ability to control his actions at the Bill Marsh dealership and the Berends' residence exemplified his ability to conform his conduct to the requirements of the law. In both cases, defendant was deterred from doing an illegal act by ordinary circumstances. Clark testified that the fact that defendant did not single-mindedly pursue his goals indicated that he was in good control of his actions.

During closing arguments, defendant's trial counsel abandoned any attempt to argue that defendant did not appreciate the nature and quality or the wrongfulness of his actions, but rather concentrated his argument on the theory that, because defendant felt compelled by signs from God, he could not conform his conduct to the requirements of the law. While this argument contradicted Norris' interpretation of defendant's conduct, it was consistent with portions of Norris' testimony and was reasonable in light of the totality of the evidence.

Defendant repeatedly made comments and took actions, which indicated that he was fully aware of the wrongfulness of his conduct and the potential repercussions. Bonnie and Benjamin Flynn both testified that defendant apologized after taking Benjamin's truck. If defendant did not appreciate the wrongfulness of his conduct he would not need to apologize. Likewise, defendant repeatedly asserted that he took many of the actions that he did in order to get the police officers to shoot and kill him. As Clark noted, defendant had to understand that the

officers would not shoot him unless he engaged in unlawful conduct. In addition, after defendant was captured, he told one officer that he believed he would be charged with assault with the intent to commit murder and to another officer he characterized his taking of vehicles as "stealing." Indeed, defendant wrote a journal entry that stated that he intended to steal a Dodge Dakota and when asked why he wanted to take a truck from the dealership, defendant replied that he did not think his Jeep could outrun the police. Finally, defendant told Clark that he got back into the stolen police car and left the Berends' residence because he saw Berends' son and did not want him to be around that kind of activity. Consequently, there was extensive evidence that defendant appreciated the nature and quality or the wrongfulness of his conduct.

On the other hand, Norris testified that, while under the delusion of his mental illness, defendant engaged in ad hoc reasoning where he would have a thought and then observe a sign that would either confirm the validity of the thought or point him in another direction. This interpretation of defendant's illness is supported by defendant's history of mental illness, journal entries and statements. Defendant testified that he thought the failure of the police officers to pursue him further into the woods was a sign that he was to get away. He also stated that he thought seeing Bonnie Flynn driving up to her home was a sign that he should take her car. Defendant also interpreted the fact that the Blue Ford got stuck as a sign that it was time for a shootout with the police and Griffith's failure to kill him after firing so many shots was a sign that he was not supposed to die. In addition, defendant's journals and prior history of mental illness all confirm that defendant has in the past felt compelled to embark on impromptu journeys and engage in erratic behavior based on signs.[3] Hence, the evidence supported defendant's trial counsel's argument that, although defendant knew what he was doing was wrong, because of his mental illness, he was under the belief that he had no choice but to follow these signs. Furthermore, this argument had the added benefit of explaining why defendant might conform to the requirements imposed by society and the law in one situation and ignore the requirements in a different situation. Where defendant lacked a sign, he could conform his behavior to the law; however, where defendant had a sign, he felt compelled to follow the action dictated by the sign.

Although Norris' explanation could still have been argued, after the prosecution's effective cross-examination of Norris and the rebuttal testimony by Clark, one might readily conclude that Norris' ultimate conclusion would carry very little weight with a jury. Given this situation, defendant's trial counsel had to decide whether to continue to argue a position that seemed to have overwhelming evidence against it or argue a position that contradicted the conclusion proffered by his own expert, but was otherwise consistent with the totality of the evidence. Because defendant's trial counsel's decision to take the latter course was supported by the evidence and reasonable under the totality of the circumstances, defendant has failed to overcome the strong presumption that his counsel was effective. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The fact that defendant's trial counsel's decision proved to be wrong does not by itself cause the choice to use the argument to be below an objective

[3] Clark testified that the difference between the episode that led to defendant's hospitalization at Munson in 2002 and the current episode was one of severity. Clark stated that defendant was "most clearly disturbed" during the 2002 episode.

standard of reasonableness. Rather, the question is whether counsel's decision fell within the range of competence demanded of attorneys in criminal cases. *People v Haynes (After Remand)*, 221 Mich App 551, 558; 562 NW2d 241 (1997). Therefore, defendant's trial counsel's closing argument does not fall below an objective standard of reasonableness.

B.

Defendant next contends that his trial counsel's decision to have defendant forego an independent psychiatric evaluation by Dr. Josh Haskins constituted conduct falling below an objective standard of reasonableness. Defendant further argues that, had he been fully evaluated, Haskins could have testified at trial concerning whether defendant was criminally insane. With this additional testimony, the jury would likely have returned a favorable verdict on the issue of defendant's insanity. Therefore, defendant's trial counsel's failure to obtain a full evaluation of defendant by Haskins affected the outcome of the trial. We disagree.

On March 3, 2004, the trial court held a status conference. At this status conference, defendant's trial counsel confirmed that he had retained someone to perform the third psychiatric evaluation of defendant. On April 6, 2004, the trial court held another status conference regarding the independent psychiatric evaluation. At this hearing, defendant's trial court stated,

> Your Honor, the Court has received some letters from my client and I have had a chance to discuss those with the client and I would point out to the Court and for the record that – that I – Mr. Lautner had some justifiable concerns. However, at this point we are set. We are not going to be calling another expert witness – oh, we are going to be calling an expert witness, we are not going to be seeking another forensic evaluation. The expert witness is Doctor Josh Haskins and we'll be sending that in a written notice to the prosecutor's office that we intend to be calling him as an expert witness.

After this statement, the trial court had defendant sworn in and asked,

> Q Have you heard and understood everything your attorney has said?
>
> A Yes, sir.
>
> Q And do you agree with everything he's just said?
>
> A I do. I had some reservations a month ago. He has done excellent this last month, really put forth effort and has cleared up any doubts that I've had.
>
> Q All right. So you're completely satisfied with counsel?
>
> A Yes.

At trial, the prosecutor raised an objection to the trial court concerning defendant's intention to call Haskins. The prosecutor stated that, because defendant's expert did not evaluate defendant, he should not be permitted to testify. In response, defendant's trial counsel stated that it was his intent to ask Haskins hypothetical questions, make statements regarding standards within the field of forensic psychology and discuss the general processes that are part of forensic

psychology. After hearing both sides, the trial court permitted Haskins to testify, but only "as long as he doesn't present an opinion, a separate independent opinion on Mr. Lautner's capacity at the time of the crime."

At this point, defendant interrupted and told the trial court he was under the impression that Haskins would be able to testify that he was criminally insane on the day in question. The trial court responded that he would not be able to so testify. Defendant then asked the trial court for an adjournment to obtain a full evaluation by Haskins, but the trial court refused to entertain his request. Defendant's trial counsel then called Haskins, who testified generally about schizophrenia and specifically addressed areas that Clark testified caused him to doubt that defendant was criminally insane.

Because defendant stated that he agreed with his trial counsel's decision not to have Haskins perform a full psychiatric evaluation and that he was completely satisfied with his trial counsel's performance, he has waived any error with regard to this issue. *Carter*, *supra* at 215. Further, to the extent that defendant argues that his counsel deliberately deceived him concerning whether Haskins would be able to state his opinion concerning defendant's criminal responsibility, this Court is limited to the record currently before it, see *Sabin*, *supra* at 658-659, and the record does not contain any evidence that defendant's trial counsel deliberately deceived defendant about the nature and extent of Haskins' testimony. Therefore, there is no reason to question the validity of the waiver. Furthermore, even if defendant had not waived this issue, decisions regarding the presentation of evidence 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, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Consequently, without more, we cannot conclude that defendant's trial counsel's decision to utilize Haskins as a rebuttal witness rather than express an opinion concerning defendant's mental state constituted conduct that fell below an objective standard of reasonableness under prevailing professional norms.

Finally, even if defendant had not waived this issue and this Court could reasonably conclude that the failure to have Haskins make a full evaluation of defendant constituted conduct that fell below an objective standard of reasonableness, defendant has still failed to demonstrate that, but for this error, the outcome would have been different. In the present case, both defendant's expert and the prosecution's expert testified that defendant was mentally ill on the day he committed the charged offense. The only matter of dispute was whether defendant's mental illness deprived him of the ability to conform his conduct to the requirements of the law or to appreciate the nature and quality or the wrongfulness of his conduct. Yet, despite both experts' testimony, the jury returned a verdict of guilty on all counts rather than guilty but mentally ill. Because Haskins' testimony would have been cumulative to the opinions of Norris and Clark, it is doubtful that the addition of this testimony would have altered the outcome of the trial. *Toma*, *supra* at 302. Consequently, a new trial is not warranted on this basis.

II.

Defendant next argues that he was deprived of a fair trial by the prosecutor's improper reference to defendant's ultimate disposition should the jury return a verdict of not guilty by reason of insanity. We disagree.

In order to preserve a claim of prosecutorial misconduct, the defendant must object before the trial court. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). While defendant's trial counsel did not directly accuse the prosecutor of misconduct before the court and jury, he repeatedly asserted that the prosecutor's questions were inappropriate and unfair, therefore, this issue was properly preserved by objection.

This Court reviews de novo preserved claims of prosecutorial misconduct by examining the record and evaluating the prosecutor's remarks in context to see if the defendant was deprived of a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Even if the alleged prosecutorial misconduct constituted error, it will not be grounds for reversal "'unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.'" *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999), quoting *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

At trial, defendant elected to testify on his own behalf. On cross-examination, the prosecutor began to question defendant about his current understanding regarding the wrongfulness of his prior actions. During this exchange, defendant acknowledged that taking a truck without permission, fleeing from the police, shooting at a police officer, and entering someone else's home without permission would be a crime. The prosecutor then asked,

> Q Now, I find it interesting, Mr. Lautner, isn't the – your entire presentation in this trial to try to convince this group of people that as of the 15th of March that they shouldn't hold you accountable for doing all of those things that you agree were crimes?
>
> A Yes.
>
> Q You want them to let you go, don't you?
>
> A I –

Defendant's trial counsel objected and the trial court upheld it on the basis that the form of the question was objectionable. After this exchange, the prosecutor continued to ask defendant whether it was his position that he accepted no responsibility for his actions on the day in question. Defendant's trial counsel continued to object and the trial court eventually ruled in favor of defendant, stating "Well, that does go to the ultimate issue and it's really more for the jurors, Mr. Donnelly. I guess you can ask about his other facts, if you would."

It is generally inappropriate for a prosecutor to refer to the ultimate disposition of the defendant after a verdict is rendered. *People v Wallace*, 160 Mich App 1, 6-8; 408 NW2d 87 (1987). Likewise, it is improper for a prosecutor to seek to capitalize on a jury's fear that the defendant will be set free if it returns an insanity verdict. *People v Staggs*, 85 Mich App 304, 310; 271 NW2d 211 (1978). While the prosecutor did not directly comment on defendant's ultimate disposition if found not guilty by reason of insanity, his comments that defendant's "presentation" (i.e. his insanity defense) was merely an attempt "to convince this group of people that . . . they shouldn't hold you accountable for doing all of those things that you agree were crimes[,]" which was immediately followed by the question "you want them to let you go, don't

you?" implicates defendant's ultimate disposition if found not guilty by reason of insanity. Hence, this line of questioning was inappropriate.

Even though this line of questioning was inappropriate, reversal will only be warranted where it affirmatively appears that it is more probable than not that the error was outcome determinative. *Brownridge*, *supra* at 216. Defendant argues that the fact that the jury found defendant guilty rather than guilty but mentally ill, despite the overwhelming evidence that he was mentally ill, is proof that these inappropriate questions influenced the jury's verdict and, therefore, were not harmless. We do not agree.

While it is true that both plaintiff's expert and defendant's expert concluded that defendant was mentally ill, the jury was free to disregard the expert testimony and draw its own conclusions from the evidence and lay testimony. *People v Murphy*, 416 Mich 453, 465; 331 NW2d 152 (1982); *People v Renno*, 392 Mich 45, 60; 219 NW2d 422 (1974); see also CJI2d 5.10. In fact, the trial court specifically instructed the jury that it did not have to believe an expert's opinion. In addition, Clark testified about the cyclical nature of mental illness and specifically noted that the evidence indicated that defendant's condition had improved by the time of the incidents in question. Along with this testimony, the jury heard extensive testimony concerning defendant's behavior on the day in question and, from this testimony alone, could have concluded that defendant had not proved that it was more likely than not that he was suffering from "a substantial disorder of thought or mood that significantly impair[ed] [his] judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life," on the day in question. MCL 330.1400(g).

Furthermore, the inappropriate questioning was not particularly prejudicial. Unlike the case in *Wallace*, *supra* at 7-8, the prosecutor in this case did not directly comment to the jury that defendant would get released if he were found not guilty by reason of insanity and, after just a few questions of this nature, the trial court intervened and asked the prosecutor to move on to questions regarding the facts. Finally, jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and the trial court instructed the jury that the lawyers questions are not evidence and that possible penalties should not influence its decision. Hence, after examination of the entire cause, it is not more probable than not that these comments affected the outcome of the trial. *Brownridge*, *supra* at 216. Therefore, a new trial is not warranted on this basis.

III.

Defendant next argues that the trial court erred when it ordered his sentence for assault with the intent to commit murder (Count 9) be served consecutive to his sentence for felony-firearm (Count 11) and that his sentence for carjacking (Count 10) be served consecutive to both of those sentences. We disagree.

A consecutive sentence may only be imposed if specifically authorized by law. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). This Court reviews de novo as a matter of statutory interpretation whether the trial court properly sentenced a defendant to consecutive sentences. *Id.*

Counts 9, 10 and 11 arose out of a shooting incident between defendant and an officer.

During that incident, defendant advanced on the officer, shot him, and then drove off in his police car. Based on these facts, defendant was charged with assault with the intent to commit murder (Count 9), carjacking (Count 10), and possessing or carrying a firearm during the commission of Count 9 and/or Count 10. The jury returned a verdict of guilty on all three counts. The trial court sentenced defendant to 20 to 40 years of imprisonment for both Count 9 and 10. Furthermore, it stated that the sentence for the assault with the intent to murder (Count 9) will run consecutive to and before the sentence for carjacking (Count 10). Finally, the trial court noted that those sentences would begin after the expiration of the sentence for felony-firearm under Count 11.

Under MCL 750.529a(3), a trial court may impose the sentence for carjacking consecutive to any other sentence imposed for a conviction that arises out of the same transaction. Hence, the trial court could properly order defendant to serve his carjacking sentence consecutive to his assault with the intent to murder sentence and his sentence for the related felony-firearm. Likewise, under MCL 750.227b(2) defendant's sentence for felony-firearm must be served consecutive to and before the predicate felony. Under these statutes, the trial court could properly sentence defendant to serve the felony-firearm conviction consecutive to and before the assault with the intent to commit murder sentence, which is to be served consecutive to and before the sentence for carjacking. Consequently, defendant's sentences on these counts were not contrary to law.

IV.

Defendant next argues that the trial court improperly sentenced him to 14 to 40 years of imprisonment as a habitual offender (second offense) for his first-degree home invasion conviction (Count 5). See MCL 750.110a(2); MCL 769.10(1)(a). We find no error. While the trial court did originally sentence defendant to 14 to 40 years of imprisonment for his conviction of first-degree home invasion, the trial court signed an amended judgment of sentence on September 14, 2004, which properly sentenced defendant to 14 to 30 years of imprisonment for this conviction. Therefore, there is no error for this Court to review.

V.

Defendant next argues that the trial court erroneously prevented Haskins from testifying about whether defendant was insane on the day in question. We disagree.

Defendant did not raise any objection to the trial court's determination that Haskins could not testify concerning whether defendant was criminally insane on the day he committed the charged offense. Instead, in response to an objection raised by the prosecution, defendant's trial counsel argued that his intended line of questioning did not encompass this issue. Likewise, while defendant stated that he was under the impression that Haskins would be able to testify about this matter, he never objected to the trial court's decision, but rather moved for an adjournment to obtain the necessary evaluation. Therefore, this issue was not preserved. Because this issue was not properly preserved, it will be analyzed for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). An abuse of discretion occurs only if an

unprejudiced person, considering the facts on which the trial court relied, would find that there was no justification or excuse for the ruling made. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, whether a rule or statute precludes admission of evidence is a matter of law and reviewed de novo. *Lukity*, *supra* at 484.

Under the Code of Criminal Procedure, a defendant who proposes to offer an insanity defense may secure an independent psychiatric evaluation, but must first notify the prosecutor at least 5 days before the day scheduled for the evaluation. MCL 768.20a(3). Once the evaluation is performed, the independent examiner must prepare and submit to both parties a report that contains (1) the clinical findings of the examiner, (2) the facts, in reasonable detail, upon which the findings were based, and (3) the opinion of the examiner on the issue of the defendant's insanity at the time of the alleged offense was committed. MCL 768.20a(6). The purpose of this statute is to "assure that the prosecution and defense have fair notice of, and full access to, a common body of background information." *People v Webb*, 458 Mich 265, 278; 580 NW2d 684 (1998).

Defendant contends that the rules of evidence permitted Haskins to testify concerning defendant's insanity even though he did not conduct an evaluation of defendant and did not prepare a report and submit it to the prosecution as required by MCL 768.20a. Defendant relies in part on *People v Dobben*, 440 Mich 679; 488 NW2d 726 (1992). Defendant's reliance is misplaced.

In *Dobben*, our Supreme Court addressed whether an independent psychiatric examiner offered pursuant to MCL 768.20a(3) could properly "consider information contained in prior competency evaluations in forming an opinion regarding criminal responsibility." *Dobben*, *supra* at 682. In rendering its decision, the Court noted that MCL 768.20a "sets forth the procedure for filing a notice of an insanity defense, mandates an examination by the center upon receipt of a notice of intention to assert the defense, and provides for an independent psychiatric evaluation when requested either by the defendant or the prosecuting attorney." *Id.* at 693. The Court stated that because "[s]ection 20a makes no reference to any limitation in the testimony of such an expert," it is contrary to the intent of the statute to require an independent examiner to perform an evaluation *pursuant to court order* before being permitted to rely on earlier reports. *Id.* at 693, 694. The Court then concluded that "[a] person qualified to testify as an independent expert may, consistent with the Mental Health Code, the Code of Criminal Procedure, and the Michigan Rules of Evidence, rely on historical data, including information and opinions contained in prior competency evaluations, when forming an opinion regarding a defendant's criminal responsibility." Hence, the Court in *Dobben* addressed the scope of the testimony of an expert qualified under MCL 768.20a and did not directly address whether an expert who did not perform an evaluation or make a report as required by the statute could still testify concerning a defendant's insanity.[4]

[4] The defendant in *Dobben* did argue that the prosecutor's expert examiner failed to submit a report that complied with all the requirements of MCL 768.20a(6) and, therefore, should have been barred from testifying. *Dobben*, *supra* at 687-688 n 9. However, our Supreme Court declined to determine whether the statute would preclude an expert's testimony on this basis, but
(continued…)

In *Webb*, our Supreme Court again addressed the permissible range of testimony at trial by an independent examiner qualified under MCL 768.20a. *Webb*, *supra* at 275-279. While the Court did not directly address whether an expert who did not perform an evaluation and file a report in compliance with MCL 768.20a could testify concerning the defendant's insanity, the Court's analysis of the scope of a qualifying expert's opinion suggests that an expert who does not comply with those requirements might properly be prevented from testifying about whether the defendant was insane. In its analysis, the Court in *Webb* noted that the expert in question had properly submitted a report that complied with the requirements of MCL 768.20a(6), as was required for a testifying expert. *Id.* at 275. For this reason, "the circuit court appropriately permitted him to testify." *Id.* The Court concluded that "[b]ecause the rationale behind MCL 768.20a(6) . . . had been satisfied, i.e. notice to the opposing party was provided, [the expert] should have been given the opportunity to refer to the background materials listed in the report." *Id.* at 278. This discussion indicates that, consistent with the purpose behind the statute, see *Webb*, *supra* at 278, where an expert has not performed an evaluation in compliance with MCL 768.20a(3) and prepared and submitted a report to the opposing side in compliance with MCL 768.20a(6), the trial court may properly limit the scope of the expert's testimony concerning the defendant's insanity.

In the present case, Haskins did not perform an evaluation of defendant and did not prepare and submit a report to the prosecution as required by MCL 768.20a(3) & (6). The prosecutor was not given proper notice concerning the basis for any opinion Haskins might have had concerning defendant's insanity at the time of the offense. Hence, the prosecution would have been at a disadvantage in uncovering the facts and circumstances essential to determine whether the opinion expressed was correct and to contradict it if wrong. *Dobben*, *supra* at 697. Consequently, the trial court did not abuse its discretion by limiting Haskins' testimony to topics other than defendant's insanity at the time of the offense.

VI.

Defendant next contends that the trial court erred by not ordering an investigation after he informed it that someone had removed pages from his journals. We disagree.

A reversal is warranted in cases where the police intentionally suppress exculpatory evidence or, in bad faith, suppress potentially useful evidence. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Leigh*, 182 Mich App 96, 97-98; 451 NW2d 512 (1989). However, the defendant "bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Johnson*, *supra* at 365. Because defendant failed to present any evidence to corroborate his allegations that the police or prosecutor had removed exculpatory journal entries or removed potentially useful journal entries in bad faith, the trial court was under no obligation to take any action concerning the claimed tampering.

(…continued)

instead noted that any defect in the report did not prejudice defendant. *Id.*

VII.

Finally, in his *in propria persona* brief submitted pursuant to Standard 4 of Adm Order No. 2004-6, see 471 Mich cii, defendant appends several miscellaneous claims of error to his claim that the trial court erred when it failed to order an investigation into the alleged removal of several journal entries. Because these issues were not properly raised in the statement of the questions presented, lacked citation to any authority and were insufficiently briefed, they were abandoned on appeal. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); *People v Fields*, 49 Mich App 652, 658; 212 NW2d 612 (1973) ("Moreover, this issue is not developed either by reference to the record, citation to controlling authority, or reasoned argument. Consequently, further consideration on appeal is waived.").

There were no errors warranting the requested relief.

Affirmed.

/s/ Michael R. Smolenski
/s/ Stephen L. Borrello