STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v	No. 262582 St. Clair Circuit Court
RAYMOND EUGENE LLOYD, JR., Defendant-Appellant.	LC No. 94-002308-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

This case before this Court following a remand to the trial court for a *nunc pro tunc* competency hearing. *People v Lloyd*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2000 (Docket No. 186131). Defendant was convicted by a jury trial of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The convictions arise from an incident in which defendant shot and killed a coworker following an argument. The trial court found defendant was competent to stand trial. We affirm.

On appeal, defendant does not directly attack the trial judge's determination that he was competent to stand trial. Rather, he asserts that pursuant to MCL 330.2020 *et seq*. and due process,[1] the trial court erred by refusing to allow him to elicit additional relevant testimony at the competency hearing. However, defendant did not argue below that he was entitled to present the witnesses pursuant to MCL 330.2020 *et seq*. or due process. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Accordingly, we review this issue for plain error affecting substantial rights, i.e., plain outcome determinative error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is only warranted under this standard if a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763.

[1] US Const, Am XIV; Const 1963, art 1, § 17.

It violates an incompetent defendant's right to due process to subject him to a criminal trial. *Cooper v Oklahoma*, 517 US 348, 354; 116 S Ct 1373; 134 L Ed 2d 498 (1996). Accordingly, our Legislature has established procedures for determining competency. MCL 330.2020 *et seq*. Under the statutory scheme, a defendant is presumed competent to stand trial, and

> shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial. [MCL 330.2020(1).]

The statute requires that, "a criminal defendant's mental condition at the time of trial must be such as to assure that he understands the charges against him and can knowingly assist in his defense." *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003).

If a showing is made that a defendant may be incompetent to stand trial, the court must order the defendant to undergo an evaluation at the Center for Forensic Psychiatry or another certified facility. MCL 330.2026(1). A written report must be submitted to the court containing the clinical findings of the facility, the facts on which the findings are based, the opinion of the facility on the issue of the defendant's competence to stand trial, and, if the opinion indicates that the defendant is incompetent to stand trial, the opinion of the facility as to whether the defendant will be able to attain competence within the time limits established by MCL 330.2034. MCL 330.2028. Further, the defendant is entitled to a hearing on the issue of his competency to stand trial. MCL 330.2030. "The written report shall be admissible as competent evidence in the hearing . . . . The defense, prosecution, and the court on its own motion may present additional evidence relevant to the issues to be determined at the hearing." MCL 330.2030(3). However, "[t]he determination of competency may rest solely on the report of the Center for Forensic Psychiatry if neither the state nor the defendant chooses to offer testimony." *People v Newton* (*After Remand*), 179 Mich App 484, 488; 446 NW2d 487 (1989).

On remand, licensed psychologist Jeffrey Davis of the Center for Forensic Psychology performed a competency evaluation of defendant and wrote a detailed report in which he concluded that defendant was competent to stand trial at the time of trial. Defendant then requested that he be permitted to have an independent competency evaluation performed, and the trial judge agreed. David A. Vore, Ph.D., of Genesee Psychological Resources, P.C., performed this second independent examination. He too concluded that defendant was competent to stand trial. Primarily considering these two reports and his own observations of what occurred during trial, the trial judge concluded that defendant was competent to stand trial.

Defendant asserts on appeal that he had the right pursuant to MCL 330.2030(3) to present evidence of his incompetence at the competency hearing, and that he was deprived of his right to due process by the trial court's failure to consider all of the evidence relevant to the issue of his competence. After reviewing all of the evidence and defendant's offers of proof concerning the testimony of his proffered witnesses, we conclude that any error was not prejudicial and did not affect defendant's substantial rights.

Plaintiff wanted to offer the testimony of several witnesses, we address each in turn. First, defendant wanted to offer the testimony of Anna Malawka who performed an intake assessment of defendant for Community Mental Health (CMH) approximately one month before the murder was committed and eight months before the trial took place. Her assessment indicates that defendant was composed, but also states that he had "illusions of grandeur."[2] The assessment also indicates that defendant's stream of thought was tangential. Under the heading "TENTATIVE DIAGNOSIS," the report sets forth the following under Axis I (clinical syndromes): "R/O Paranoid Schizophrenia[,] R/O Delusional Disorder."[3] The assessment also sets forth under Axis II (Personality Disorders/Traits, Developmental Disorders) the following diagnosis: "Intermediate Explosive Disorder 312.34."

The record also indicates that both Davis and Vore considered defendant's CMH records in evaluating defendant's competence to stand trial, including the report prepared by Malawka. Moreover, the CMH intake assessment prepared by Malawka was itself admitted as evidence. Defendant has not made an offer of proof about which Malawka might have testified beyond what was contained in the report itself. Because this evidence was presented to the court and considered by both experts who performed defendant's competency evaluations, we conclude that Malawka's testimony would have been cumulative, and, thus, unlikely to affect the trial court's competency determination.

Moreover, there was substantial evidence that defendant was competent to stand trial including: the testimony of clinical psychologist Stephen A. Norris, Ph.D., who conducted a criminal responsibility examination of defendant before his trial and concluded that defendant was not delusional, incoherent, or scattered in his thought patterns; defendant's trial attorney's indication to the court that defendant was competent to stand trial; defendant's evident participation in determining his own defense strategy; and the reports of the two experts who concluded defendant was competent to stand trial. Considering the foregoing, we conclude that there is no reasonable probability that defendant was prejudiced by the trial judge's refusal to let Malawka testify.

Defendant also wanted to present CMH jail liaison David Baer as a witness. In an internal document, Baer referenced the fact that he believed defendant was suffering from delusional thinking. But, similar to Malawka's opinions, Baer's opinions were already contained in the trial court record and referenced by both experts' reports concerning defendant's competency to stand trial. While Baer might have been questioned about the origin of the internal communication, we cannot conclude from the evidence contained in the record, that the trial judge's exclusion of such evidence constituted plain error affecting substantial rights. Even if Baer had been able to recount a delusional episode defendant suffered while awaiting trial, the substantial other evidence described above indicated defendant was competent to stand trial. Consequently, there is no reasonable probability that defendant was prejudiced by the trial judge's refusal to let Baer testify.

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[2] We assume this is a reference to delusional thought patterns, i.e., delusions of grandeur.

[3] Apparently, "R/O" stands for "rule out."

Defendant also wanted his mother Paulette Williams and his cousin Roni Lloyd to testify. According to defendant, they would have testified that defendant's mental health was declining before the shooting, and that his thinking became even more illogical following his arrest. There is no indication that Davis either spoke with these witnesses or knew of their concerns. However, Vore's report indicates that he spoke with each of these witnesses for approximately 45 minutes. In fact, Vore recounted his conversations with these witnesses in detail.

According to Vore, Williams told him that while defendant was in jail, he had heard voices and had seen the man he killed standing beside him. But, the report also states that Williams told Vore that defendant told her during the trial process that he wanted to testify, even though his attorney did not want him to do so, and that she believed defendant understood the charges against him and the possible consequences. According to Vore, Roni told him that defendant had lived with her for a month shortly before the crime took place. Roni told Vore that she asked defendant to leave after she became frightened by his "rambling" statements. Vore also reported that Roni told him she believed defendant understood the potential consequences of the charges against him, the role of various court personnel, and also reported defendant did not misbehave during trial.

Defendant has not demonstrated that Williams or Vore would have provided any additional relevant information to the trial judge beyond what was contained in Vore's report. Thus, it appears that any relevant evidence these witnesses could have provided was already available to the trial judge and was considered by defendant's own independent examiner who nevertheless found defendant was competent to stand trial. On these facts, we conclude that the trial court's refusal to hear additional testimony from Williams and Roni was not plain error affecting substantial rights. Indeed, because the evidence these witnesses had to offer was available to the judge through the admission of Vore's report, there is no reasonable probability that their testimony would have affected the outcome of the competency hearing.

Defendant also wanted his appellate attorney to testify concerning his interactions with defendant approximately seven months after the trial. According to the attorney's affidavit, defendant was unable to remain focused on a topic for more than a few minutes and repeatedly claimed that he was the focus of a conspiracy carried out "by the police, the state and religious infidels." Although the expert's competency evaluations do not reference these observations, the affidavit was contained in the record and discussed in briefs the trial judge indicated that he had read. Because defendant has not asserted that his appellate attorney could have provided any relevant evidence beyond what was contained in his affidavit, we conclude that any error in the trial court's failure to hear this testimony did not affect defendant's substantial rights. As with the other proffered testimony discussed above, in light of the substantial evidence of defendant's competency to stand trial, there is no reasonable probability that the attorney's testimony would have affected the outcome of the competency hearing.

Finally, defendant requested that he be permitted to testify concerning his own competency at the time of the trial. Presuming that a defendant has a due process right to testify at his own competency hearing, we conclude the judge's error in refusing to permit defendant to testify is not plain error affecting his substantial rights. In this instance, the trial judge had the opportunity to observe defendant during a trial at which he testified and to consider five psychological reports concerning defendant that were based in large part on interviews of defendant. Two of the reports, which concerned criminal responsibility but also include

information relevant to the competency determination, were prepared near the time of the trial. Further, the two reports specifically addressing defendant's competency to stand trial were lengthy and detailed, and both concluded that defendant was competent to stand trial. It is not clear to us what defendant could have testified about that might have altered the outcome of the competency hearing. According to the experts, defendant understood the charges against him and was able to knowingly assist in his defense. Vore summarized some of his findings as follows:

> Regardless of the equivocal nature of records pertaining to psychological/psychiatric diagnosis of Mr. Lloyd, information available to this Examiner regarding his level of functioning during the course of his trial is not indicative of the presence of behavioral problems that impaired him in terms of his ability to participate in the proceeding. Further, information obtained during the present independent psychological evaluation, in the opinion of this Examiner, indicates that Mr. Lloyd was aware of the charges against him and of the possible consequences associated with conviction on those charges at the time of his trial. Although Mr. Lloyd indicated that he did not feel he was adequately represented by defense counsel during the trial process, there is no basis to conclude that he was unable to participate in preparation of his own defense during that time span. To the contrary, information available to this Examiner indicates that Mr. Lloyd was able to provide a detailed, specific account of circumstances surrounding the offense both to his defense attorney and through direct testimony provided during trial. Information obtained directly from Mr. Lloyd indicated that, at the time of this trial, he had a basic understanding of the trial process and understood the role of various court room personnel. Statements made by Mr. Lloyd reflected his dissatisfaction with the manner in which Attorney West was representing him throughout the trial process suggesting that he had a clear perspective regarding the course of the trial process. Mr. Lloyd stated to this Examiner that he discussed his case with other inmates in the St. Clair County Jail and made decisions regarding the defense strategy and course of his case based upon information obtained from these individuals. This resulted in his decision to seek an independent psychological evaluation regarding mental status at the time of the offense and to provide direct testimony during the trial. Although the outcome of these two decisions was not positive regarding resolution of Mr. Lloyd's case, the fact that he made these decisions does not equate to lack of competency to stand trial.

Because the evidence contained in the record illustrates that defendant clearly understood the charges against him and was able to knowingly assist in his defense, we conclude that any potential error in the court's refusal to permit defendant to testify at his competency hearing did not affect his substantial rights. There is nothing in the record to indicate that defendant's testimony might have altered the outcome of the competency hearing. *McSwain*, *supra* at 692.

We similarly reject defendant's broader argument that his right to due process was violated by the trial judge's failure to hear the testimony of the other witnesses discussed above. Because it is apparent that the evidence defendant sought to introduce was available to the judge through affidavits, CMH and jail records, and the psychological examiners reports to the court,

any error in the exclusion of the witnesses was not plain error affecting substantial rights, and, therefore, reversal is not warranted on this basis. *Carines, supra*.

Defendant also makes an unpreserved argument that the trial judge was required to sua sponte disqualify himself from presiding over the competency hearing pursuant to MCR 2.003(B)(2) because he relied in part in reaching his competency determination on his own observations of the trial. MCR 2.003(B)(2) provides that a judge is disqualified from presiding if he "has personal knowledge of disputed evidentiary facts concerning the proceeding." Knowledge gained during the judicial proceedings is not a basis for disqualification pursuant to MCR 2.003(B)(2). *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 729; 591 NW2d 676 (1998). And, the trial judge did not rely on extraneous evidence in reaching its decision. Accordingly, defendant's right to confrontation[4] was not violated. *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991).

The trial judge based its conclusion that defendant was competent to stand trial, in part, on defendant's behavior during the trial itself and the surrounding circumstances. This evidence was contained in the record, and defendant's counsel at the competency hearing was free to argue that this evidence was outweighed by other evidence. In fact, counsel did so argue. The trial judge simply disagreed. Accordingly, we see no plain error affecting substantial rights.

Because of our resolution of these issues, we need not address the remainder of the issues defendant raises on appeal.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

[4] US Const, Am VI; Const 1963, art 1, § 20.