STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2009
v	No. 282923 Oakland Circuit Court
RAULE EMILIO BACON, Defendant-Appellant.	LC No. 2007-213678-FH

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a controlled substance (codeine), 333.7403(2)(b)(ii), operating a vehicle while visibly impaired, MCL 257.625(3), and possession of a firearm while under the influence of intoxicants, MCL 750.237(1)(a). The trial court sentenced defendant to 18 months' probation for each of his convictions. Because defendant was not denied a fair trial by the admission of expert opinion testimony that defendant was under the influence at the time of the incident, defendant was not denied the effective assistance of counsel at trial, and sufficient evidence supports defendant's convictions, we affirm.

This case arises from a traffic accident that occurred on August 14, 2005, in Detroit, Michigan between defendant and another driver, Janice West. The accident took place when the passenger front end of defendant's vehicle hit the rear driver's side of West's vehicle. West testified that she was driving in rain and fog at a speed under 20 miles per hour on eastbound Eight Mile Road in light traffic at about 2:00 a.m. when she felt something hit the back left of her vehicle. West estimated that defendant was traveling 45 to 50 miles per hour. After the accident, defendant walked up to West's vehicle and he asked why she had stopped in the middle of the road. She responded that she had not stopped.

When police arrived at the accident scene an officer smelled alcohol on defendant's breath and thought defendant seemed a little disoriented and distracted. Defendant denied that he had been drinking and said he was just tired. Officers thought defendant might be under the influence of something other than alcohol. Officers initially decided only to issue defendant a citation for the accident and secured defendant in a patrol car to take him to the police station so he could arrange for a ride home. At this time defendant informed police that he had a concealed weapons permit and two handguns in his car. Officers found two handguns in defendant's Jeep. One was found loaded in the center console and the other in a safe on the floor of the passenger

side. Police while retrieving the weapon out of the center console observed seven loose pills of different colors and shapes in the center console but no pill bottles. The pills were taken into evidence. Two white pills were later identified as Tylenol #4 with codeine, which is a controlled substance. The others were identified as carisoprodol, commonly known as Soma, trazodone, sildenafil citrate, commonly known as Viagra, diazepam, which is a controlled substance commonly known as Valium, and alprazolam, which is a controlled substance commonly known as Xanax.[1]

The officers returned to the patrol car to inform defendant about the pills and read defendant his chemical test rights. Defendant refused to have his blood drawn. Officers obtained a warrant to get a sample of defendant's blood and took him to St. John Oakland Hospital. The time of the incident was 2:25 a.m. and the time of the blood draw was 5:58 a.m. Defendant's blood showed .02 grams of alcohol for 100 milliliters of blood at the time of the sample. Michelle Glinn is the supervisor of the toxicology unit of the Michigan State Police Crime Lab. At trial, Glinn was qualified as an expert. She testified that using retrograde extrapolation, defendant's blood alcohol level at the time of the accident would have been somewhere between .05 and .12, depending on how often he drank, which would dictate how fast his body metabolized the alcohol. Glinn also tested defendant's blood for drugs. The results showed therapeutic levels of alprazolan, which is Xanax, diazepam, which is Valium, carisoprodol, which is a prescription muscle relaxant known as Soma, and codeine, which is an opiate pain killer. Glinn also detected the presence of, but did not assign a level to paroxetine, which is Paxil, fluoxetine, which is Prozac, norcodeine, which is a metabolite of codeine, and lidocaine.

At trial, defendant testified that he is a pharmacist and worked as one in August 2005. On the date of the incident defendant was at his home in the early evening hours and he left his home at about 11:00 p.m. He had been at home for about five hours and had not had any alcohol or consumed any pills. He was also not on any medication. He left his house to go to a bachelor party at Hot Tamales, a strip club, where he arrived around midnight. He did not take any pills at the party, but drank two cups of an alcoholic punch, that someone poured for him from a pitcher. Defendant did not know any other way that the drugs could have gotten in his blood other than the punch at the party. He was at the bar until some time after 2:00 a.m. and also drank half of a Corona. When he left, defendant did not feel light headed or intoxicated. While he was driving the speed limit or a couple miles an hour over it on Eight Mile, defendant saw a vehicle and tried to hit his brakes. His brakes locked and he started spinning, causing him to clip the driver's side of the other vehicle.

Defendant also testified that he did not know there were any loose pills in his car. Defendant believed that it was possible the pills found in his vehicle came from another source because he drove a friend, David Johnson, to kidney dialysis and Johnson put his pills in the center console on those trips. However, David Johnson testified that while he would carry certain pills with him on these trips including Tylenol with codeine, he did not carry Xanax or

[1] Although diazepam and alprazolam are controlled substances, defendant was not charged with any crime related to possession of these substances.

Valium with him. Defendant also testified that he used his vehicle to deliver medications, and his wife, brother, as well as other pharmacy technicians had all driven his vehicle.

On appeal, defendant argues that his due process right to a fair trial was violated by Glinn's testimony on the legal issue of whether he was under the influence of intoxicants at the time of the accident. Defendant specifically contends that this testimony went beyond merely embracing the ultimate issue to be tried because it usurped the role of the jury and was opinion testimony of his guilt. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315, 721 NW2d 815 (2006). "However, whether a rule or statute precludes admission of evidence is a matter of law and is reviewed de novo." *Id*. "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). It is necessarily an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Martin*, *supra* at 315.

It is an established rule of Michigan jurisprudence that a witness cannot express an opinion concerning the guilt or innocence of a criminal defendant. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). However, expert opinion testimony that embraces an ultimate issue to be decided by the trier of fact is not objectionable. MRE 704; *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Nevertheless, expert testimony is inadmissible to express legal definitions. *People v Caulley*, 197 Mich App 177, 193; 494 NW2d 853 (1992).

The record reveals that Glinn based her testimony on facts presented by the prosecutor regarding the accident including defendant's behavior at the scene of the accident, as well as the results from his blood test. Utilizing assumptions based on the evidence presented, Glinn gave her expert opinion that defendant was under the influence of drugs as a part of a hypothetical. Although Glinn's testimony embraced the ultimate issue to be decided, she did not provide an opinion on defendant's guilt. Though Glinn stated in her opinion that defendant was under the influence as a legal concept, she did not define the phrase "under the influence."

Defendant relies on this Court's opinion in *People v Lyons*, 93 Mich App 35; 285 NW2d 788 (1979) to support his argument that Glinn's testimony went beyond merely embracing the ultimate issue to be tried because it usurped the role of the jury and was opinion testimony of defendant's guilt. But Glinn's testimony is easily distinguishable from that in *Lyons*. In *Lyons*, an expert for the prosecution defined what qualified as a security under the Uniform Securities Act even though the trial court disagreed with the witness's interpretation. *Id*. at 45-47. This Court vacated the defendant's conviction in *Lyons*. *Id*. at 47. Here, unlike *Lyons*, Glinn did not provide a definition for "under the influence." Rather, she provided her expert opinion based on hypothetical information provided by the prosecutor and the blood results. Moreover, defense counsel was able to cross-examine Glinn on her testimony, and the jury was free to accept or reject her opinion on the issue. In fact, the verdict showed that the jury did reject Glinn's opinion because it acquitted defendant of the charge of operating a vehicle while under influence and convicted him of the less serious charge of operating while visibly impaired. The trial court did not abuse its discretion.

Next, defendant argues that his counsel's failure to object to the admission of the pills seized from his vehicle was an unreasonable decision that resulted in his convictions. Defendant

contends that a crucial witness who handled the seized pills did not testify and there was no one to explain the discrepancy between the seized pills with no markings and the pills that were tested displaying markings. Defendant asserts that, as a result, there was a real question regarding preservation of the evidence. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id*. Although defendant moved this Court to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court denied his motion. Therefore, this Court's review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Gaps in the chain of custody of the evidence go to the weight of the evidence, not its admissibility, and the admission of evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130-132; 527 NW2d 34 (1994). "[T]he admission of relatively indistinguishable evidence requires a chain of custody only sufficiently complete to 'render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with.'" *Id*. at 131, quoting 2 McCormick, Evidence (4th ed), § 212, pp 8.

In this case, the dispute over the evidence centers on two white pills police seized from defendant's vehicle after the accident. The two pills were later identified as Tylenol #4 with codeine. When they were tagged as evidence, John Cleveland, the officer who seized the pills, did not note any markings on the white pills, while noting markings on other pills that were seized. He testified that the pills were kept in a drug safe until they were delivered to the crime lab. When the white pills were tested at the crime lab, the reports from the lab indicated that the white pills had markings. Derek Knoll, a forensic scientist with the Michigan State Police, testified that Cheryl Targogian, who is also a forensic scientist with the Michigan State Police, did the first chemical analysis on one of the white pills. Her report indicated that she received the evidence on August 15, 2005, and completed the analysis on September 23, 2005. Knoll did a second analysis on March 6, 2006, of the other white pill because Targogian would not be

available to testify. Both tests showed that each white pill was Tylenol #4 with codeine. Both Cleveland and Knoll testified that the pills admitted at trial were the same ones they handled.

Based on the chain of custody evidence presented at trial, it is at least reasonably probable that the two white pills were not exchanged or contaminated or tampered with. *White, supra* at 131. The only evidence of a break in the chain of custody was Cleveland's failure to note any markings on the two white Tylenol #4 pills. Beyond this slight failure, which could merely be a clerical error, there is no evidence that the pills were exchanged or tampered with. *Id*. Indeed, Cleveland testified at trial that the pills shown in court were the ones he seized from defendant's car. Also, there was testimony about the movement of the pills from their initial seizure and the two separate transfers and tests at the crime lab. Again, the admission of evidence does not require a perfect chain of custody. *Id*. at 130-132. Based on the evidence, there is at least a reasonable probability that the white pills were not exchanged or tampered with, and therefore, the trial court properly admitted the white pills. Because a defendant is not deprived of the effective assistance of counsel by his counsel's failure to make a futile objection, defendant has not shown error. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant also renews his request for this Court to remand this case to the trial court for a *Ginther* hearing. This Court denied defendant's prior motion to remand because defendant "failed to identify an issue to be reviewed on appeal and to demonstrate by affidavit or an offer of proof the facts to be established at the hearing." *People v Bacon*, unpublished order of the Court of Appeals, entered on July 31, 2008 (Docket No. 282923). To be entitled to a remand defendant must show by affidavit or offer of proof that there are facts to support his claims. MCR 7.211(C)(1)(a). Defendant must also show that the issues have enough merit to warrant remand for an evidentiary hearing. *People v LaPlaunt*, 217 Mich App 733, 735-737, 552 NW2d 692 (1996). Defendant fails to show that this issue warrants remand because he did not make an offer of proof or attach an affidavit to show any factual development that would justify remand. Therefore, remand is not warranted.

Finally, defendant argues that because the trial court improperly admitted the pills into evidence, there is insufficient evidence to support his convictions. A challenge to the sufficiency of evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id*., quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The whole of defendant's argument regarding the sufficiency of the evidence for each of his convictions relies entirely on the assumption that the trial court improperly admitted the pills found in his vehicle into evidence at trial. Because we concluded there was no error in the admission of the pills, defendant's argument is without merit.

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio