

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DAVID ANTONE,

Defendant-Appellant.

UNPUBLISHED

August 16, 2011

No. 297466

Macomb Circuit Court

LC No. 2009-003929-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and armed robbery, MCL 750.529. We affirm.

Defendant argues that his right to present a defense was violated because the trial court precluded expert testimony that was relevant to his self-defense claim. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). However, this Court reviews de novo whether a defendant has been deprived of the right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

"A criminal defendant has both state and federal constitutional rights to present a defense, which rights include the right to call witnesses." *People v Steele*, 283 Mich App 472, 488; 769 NW2d 256 (2009). Still, it is well established that the right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). That is, "[t]he accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Defendant proposed to offer expert testimony from Dr. Schoener, a pharmacologist, regarding the effects the various drugs in the body of the decedent, Michael McCarthy, had on his demeanor and behavior on the night he was killed. To permit defendant's expert to testify, the trial court must first determine whether the expert's testimony would assist the trier of fact:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [MRE 702.]

We conclude that the trial court did not abuse its discretion in finding that defendant's expert would not assist the jurors in understanding the evidence or in determining a fact in issue regarding defendant's self-defense claim. At trial, defendant presented a self-defense theory. Defendant's theory was based on his testimony as well as that of codefendants Jacob Androsuk and Thomas Post. Defendant contends that the proposed expert testimony was relevant to his defense because it would have shown that the combination of drugs in McCarthy's body affected his stability and gait. He contends that the "jury should have been allowed to consider whether [McCarthy] fell to the ground not because he was hit with a rock, but because he was intoxicated and/or affected by the drugs in his system."

Under the Self-Defense Act, MCL 780.971 *et seq.*, a person who has not or is not engaged in the commission of a crime may use nondeadly force where he has the legal right to be with no duty to retreat if he honestly and reasonably believes that the use of force is necessary to defend himself from the imminent unlawful use of force by another person. MCL 780.972(2). A self-defense claim is based upon the circumstances as they appeared to defendant, and not as they actually existed. *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982); *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976). Further, "those circumstances as they appeared to the defendant must result in a reasonable belief that he, the defendant, is in danger of death or serious bodily harm." *Id.*, citing *People v Lenkevich*, 394 Mich 117, 124; 229 NW2d 298 (1975).

In the present case, the proposed expert testimony was not relevant because it would not have assisted the jury in determining whether defendant honestly and reasonably believed he was in danger of imminent death or great bodily harm. Defense counsel submitted that defendant's expert would testify that the "plethora of medications affect[ed] the way [McCarthy] . . . was acting" and to "what happens when you mix those medications, as to [McCarthy's] behavior, how he responded after the rock hit him and was on the ground, moving, not moving, how those medications [would] affect somebody in that situation." The proposed expert testimony regarding how the various drugs affected McCarthy has no bearing on the self-defense issue. The testimony would not have explained how defendant might have an honest and reasonable belief that danger or great bodily harm was imminent. Further, the proposed expert testimony would not have shed light on the circumstances as they "appeared to defendant." Instead, the proposed expert would have testified to how "those medications [would] affect somebody." At most then, the testimony would have revealed the circumstances as they actually existed at the time; however, a self-defense claim is not based on the circumstances as they actually existed, but rather on how they appeared to defendant. *Perez*, 66 Mich App at 692. Therefore, the proposed expert testimony had no bearing on the self-defense inquiry, and thus, the trial court did not abuse its discretion when it precluded the proposed expert testimony.

Next, in his Statement of the Questions Presented, defendant asserts that the trial court erred when it precluded the proposed expert testimony because the prosecution did not raise the issue until the third day of trial. Because defendant failed to adequately brief this position, or support this claim with authority, we deem the issue is abandoned. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). In sum, we hold that the trial court did not abuse its discretion when it ruled that defendant's expert witness would not assist the jury to understand the evidence or determine a fact in issue.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder

/s/ Donald S. Owens