STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASSET LAHDIR,

Defendant-Appellant.

UNPUBLISHED
December 26, 2019

No. 345452
Ottawa Circuit Court
LC No. 17-041588-FH

Before: METER, P.J., and O'BRIEN and TUKEL, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b). The trial court sentenced defendant to 3 to 15 years' incarceration. Defendant now appeals as of right. We affirm.

I. FACTS

This case stems from allegations that defendant sexually assaulted the victim while on a date. Defendant and the victim met at a bar and exchanged numbers. Later, the two went on a series of dates. On September 24, 2017, defendant invited the victim to his home before a planned dinner. While they were at defendant's home, defendant attempted to have sexual intercourse with the victim. The victim explained to defendant that she did not wish to have sex and was uncomfortable. When defendant continued to undress her, the victim repeatedly attempted to stop him and vocalized her lack of consent. Defendant proceeded to undress the victim and genitally penetrate her. After the assault, the victim went to the hospital and submitted to a sexual assault examination. The victim told the sexual assault nurse who examined her that she did not consent to defendant's sexual advances. Detective David Bytwerk interviewed defendant a few days later at the police station. Defendant drove himself to the police station, was not restrained in any way, and was told that he would not be arrested that day. Furthermore, the door of the interview room was not locked and Detective Bytwerk read

defendant his *Miranda*[1] rights before the interview began. Defendant was not a native English speaker, but Detective Bytwerk did not believe during the interview that language was a barrier. In the interview, defendant admitted that he had sexual intercourse with the victim. After the interview concluded, defendant left the police station.

Defendant was eventually arrested and convicted of CSC-III. At trial, defendant was provided with interpreters, and he did not testify. The trial court did not create a record of defendant waiving his right to testify.

After filing the present appeal, defendant filed a motion to remand to the trial court. Defendant argued that the trial court violated his constitutional right to testify by not advising defendant of his right to testify through a translator when defendant only spoke English as a second language. Defendant also alleged that defense counsel was ineffective for failing to advise defendant of his right to testify at trial and for failing to file a motion to suppress statements from defendant's police interrogation. This Court granted defendant's motion and remanded to the trial court for an evidentiary hearing. *People v Lahdir*, unpublished order of the Court of Appeals, entered on May 22, 2019 (Docket No. 345452).

On remand, the trial court held an evidentiary hearing. Detective Bytwerk, defendant's trial attorney, and defendant testified at the evidentiary hearing. Following the evidentiary hearing, the trial court denied defendant's motion for new trial. Specifically, the trial court found that defendant adequately understood English even without an interpreter and, therefore, that he understood that he had a right to testify at trial; the trial court also found that it was not required to obtain a waiver of this right on the record. Additionally, the trial court found, defendant understood English well enough to make a knowing and voluntary statement to Detective Bytwerk during his interview at the police station. Accordingly, any motion by defendant's trial attorney to suppress this statement would have failed. This appeal followed.

II. ANALYSIS

A. HEARSAY

Defendant argues that the trial court erred by admitting hearsay testimony of the sexual assault nurse. Defendant additionally argues that his trial counsel was ineffective for failing to object to this hearsay testimony. We disagree.

1. PRESERVATION

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW 2d 67 (2001). Defendant failed to object to the sexual assault nurse's testimony at trial. Thus, the issue is unpreserved.

[1] *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

To properly preserve a claim of ineffective assistance of counsel, a defendant must move for either a new trial or a *Ginther*[2] hearing in the trial court; failure to make any such motion "ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-689; 620 NW2d 19 (2000). Defendant failed to move for a new trial or a *Ginther* hearing based on his trial counsel's failure to object to the sexual assault nurse's testimony. Thus, this issue also is unpreserved.

2. STANDARD OF REVIEW

Unpreserved issues are reviewed for plain error. *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks, citations, and brackets omitted).]

In the instant context, prejudice "requires a showing . . . that the error affected the outcome of the lower court proceedings." *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014) (quotation marks and citation omitted).

Regardless of whether a claim of ineffective assistance is duly preserved, if the trial court did not hold a *Ginther* hearing, "our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "Whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court made a mistake." *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012).

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

3. ANALYSIS

Under MRE 803(4):

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
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> (4) Statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

As this Court explained in *People v Garland*, 286 Mich App 1, 8-9; 777 NW2d 732 (2009) (citation and quotation marks omitted):

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment are admissible as an exception to the hearsay rule. The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care.

A number of factors in this case support a holding that the victim's statements to the sexual assault nurse were relevant for purposes of medical treatment. First, the victim's statements to the nurse practitioner "were reasonably necessary for her treatment and diagnosis." *Garland*, 286 Mich App at 9. Generally, a victim's "history is very important because it tells [the examiner] how to treat the patient and how to proceed with the examination." *Id*. At trial, the sexual assault nurse confirmed that she needed to know precisely what occurred during the sexual assault so that she could plan treatment for physical and emotional injuries

The victim sought medical treatment for the purposes of treating side effects from sexual assault, rather than preserving evidence. This examination occurred within 24 hours of the sexual assault. The police report and subsequent investigation only began after this report. See *Garland*, 286 Mich App at 9 (holding that the statements a sexual assault victim made to a nurse were admissible under MRE 803(4) because "[t]he police investigation occurred after, and separate from, the nurse's taking of the history and examination."). Because medical treatment was the motivating factor for the victim's statements to the sexual assault nurse, this factor supports the admissibility of this evidence under the medical treatment exception to the hearsay rule.

Finally, the victim clearly possessed the requisite "self-interested motivation to speak the truth to treating physicians in order to receive proper medical care." *Garland*, 286 Mich App at 9. We have previously held that "the injuries inflicted on the victim in a sexual assault" even if undetectable at first, nevertheless "require diagnosis and treatment." *Id*. at 9-10. Thus, clearly detectable injuries, as were present here, certainly require proper diagnosis and treatment, and thus fall within MRE 803(4). And because the victim's statements to the sexual assault nurse fall within the recognized hearsay exception of MRE 803(4), the trial court did not err by permitting its introduction. Consequently, defendant's trial attorney was not ineffective for failing to object to the sexual assault nurse's testimony. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

B. DEFENDANT'S RIGHT TO TESTIFY

Defendant argues that his constitutional right to testify was violated by the trial court's failure to obtain a waiver of this right on the record in light of defendant's language barrier. Defendant additionally argues that his trial counsel was ineffective for failing to advise him of his constitutional right to testify. We disagree.

1. PRESERVATION

"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 failed to argue at trial that his right to testify was violated. Thus, the issue is unpreserved. Defendant's ineffective assistance of counsel argument, however, is preserved because he moved for a new trial on that ground and the trial court held a *Ginther* hearing on the issue. See *Sabin (On Second Remand)*, 242 Mich App at 658-689.

2. STANDARD OF REVIEW

Because it is unpreserved, defendant's argument that his right to testify was violated is reviewed for plain error. See *Carines*, 460 Mich at 763. Defendant's ineffective assistance of counsel claim is "limited to the facts on the record." *Wilson*, 242 Mich App at 352. "Whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *Trakhtenberg*, 493 Mich at 47.

3. ANALYSIS

A "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. . . ." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

> 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. [*People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) (citations omitted).]

The "reasonable probability" standard can be satisfied by less than a preponderance of the evidence. *Trakhtenberg*, 493 Mich at 56.

The "reviewing court must not evaluate counsel's decisions with the benefit of hindsight," but should "ensure that counsel's actions provided the defendant with the modicum of representation" constitutionally required. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Thus, there is a "strong presumption that trial counsel's performance was strategic," and "[w]e will not substitute our judgment for that of counsel on matters of trial strategy[.]" *Id*. at 242-243. "Yet a court cannot insulate the review of counsel's performance by calling it trial strategy." *Trakhtenberg*, 493 Mich at 52. "The inquiry into whether counsel's performance was reasonable is an objective one and requires the reviewing court to determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (quotation marks and citation omitted). Accordingly, the reviewing court must consider the range of potential reasons that counsel might have had for acting as he or she did. *Id*.

"A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011) (citations omitted). "[T]here is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify." *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

Defendant argues for a narrow exception to *Harris*: that when the trial court is aware that a defendant does not speak English, an on-the-record waiver is required. Defendant analogizes the fundamental right to a translator in criminal prosecutions to the instant case and argues that he was entitled to a requirement of an express, on-the-record waiver of his right to testify.

A defendant possesses a constitutional right to an interpreter in criminal proceedings. *People v Gonzalez-Raymundo*, 308 Mich App 175, 188-189; 862 NW2d 657 (2014). This right is "not merely statutory as codified by MCL 775.19a, but constitutional, and thus subject to every reasonable presumption against its loss." *Id*. at 188. The waiver of a right to an interpreter must be placed on the record. See *id*. at 189 (holding that because the trial court failed to personally ask defendant whether he was aware of his rights to an interpreter, the waiver of that right was uninformed).

Defendant's analogy to the right to an interpreter actually highlights why an on-the-record waiver of the right to testify was unnecessary in this case. Providing an interpreter for a defendant who does not understand English ensures that the defendant can understand the entirety of the proceedings in the same way that an English-speaking individual could. See

Gonzalez-Raymundo, 308 Mich App at 188-189 (holding that providing an interpreter to a defendant who does not speak English ensures that the defendant can adequately understand the proceedings). Accordingly, the presence and participation of interpreters in this case ensured that defendant understood the proceedings in the same way that an English-speaking defendant would have. Indeed, defendant has not made any argument that his interpreters were deficient in any way. Thus, because defendant was able to understand the proceedings and thus was in no different position than any other defendant in that regard, the trial court was not required to obtain a waiver of defendant's right to testify on the record. See *Harris*, 190 Mich App at 661 ("[T]here is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify.").

Consequently, there was no external factor, such as an inability to understand the proceedings, which precluded defendant from understanding and thus invoking his right to testify. In addition, it is clear from our review of the record that defendant possessed a working knowledge of the English language and an ability to communicate. There was no barrier to defendant's ability to vocalize his desire to testify at trial in his own defense. Absent such a barrier, there was no reason for the trial court to intervene and obtain a waiver of the right to testify on the record, or even to question whether defendant was aware of his right to testify.

Moreover, it is clear from the record that defendant did understand that he possessed the right to testify at trial. Defendant's own affidavits submitted in support of his claim acknowledge that on at least two occasions, he discussed with defense counsel whether he should testify. Consequently, defendant's claim on appeal relies on a distinction between being told that he possessed an *ability* to testify in the trial court—which admittedly occurred—and a constitutional *right* to testify in the trial court—which defendant disputes.

This distinction is of no consequence here. Our focus when reviewing the waiver of a defendant's right to testify is whether the defendant possessed sufficient knowledge of the ability to testify in order to make a rational choice. See *Bonilla-Machado*, 489 Mich at 421 (holding that the defendant's right to testify was not violated because the "defendant made a rational choice not to testify after he was warned of the risks involved."). Defendant and his trial attorney discussed at least two times whether defendant would testify at trial. Thus, defendant was aware of his *ability* to testify, even if no one ever explained to him basis for that ability, i.e., that he had a *right* to do so. Consequently, defendant's right to testify was not violated. Similarly, because defendant's trial attorney discussed defendant's ability to testify at trial, defendant has failed to establish the factual predicate for his claim that his trial attorney was ineffective for failing to advise him about his right to testify trial. See *Hoag*, 460 Mich at 6. Thus, defendant's claim of ineffective assistance of counsel fails in this regard.

C. POLICE INTERROGATION

Defendant argues that his trial counsel was ineffective for failing to file a motion to suppress statements defendant made during his interview with Detective Bytwerk. We disagree.

1. PRESERVATION

Defendant moved for a new trial on the ground that defendant's waiver of his *Miranda* rights during his interview with Detective Bytwerk was involuntary and not knowingly made. Thus, the issue is preserved. See *Sabin (On Second Remand)*, 242 Mich App at 658-689.

2. STANDARD OF REVIEW

Defendant's ineffective assistance of counsel claim is "limited to the facts on the record." *Wilson*, 242 Mich App at 352. "Whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *Trakhtenberg*, 493 Mich at 47.

"We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary. When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination." *People v Gipson*, 287 Mich App 261, 264, 787 NW2d 126 (2010) (citations omitted). Furthermore, "we review a trial court's factual findings for clear error" and "[d]eference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses." *Id*. (citations omitted).

3. ANALYSIS

"Both the state and federal constitutions guarantee that no person shall be compelled to be a witness against himself or herself." *People v Cortez*, 299 Mich App 679, 691; 832 NW2d 1 (2013). When a defendant is in custody, he or she is entitled to be advised of *Miranda* rights, which serve to ensure that any statement is knowing and voluntary. *Id*. But the *Miranda* right only applies to a defendant who is in custody. *JDB v North Carolina*, 564 US 261, 268-269; 131 S Ct 2394; 180 L Ed 2d 310 (2011). If a defendant is in custody, but is not advised of his rights, then any statement is presumed to be involuntary. *JDB*, 564 US at 268-269 (holding that reading *Miranda* rights to a defendant ensures that later statements are voluntary); *Miranda v Arizona*, 384 US 436, 478-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966) (holding that "unless and until" the prosecution demonstrates that *Miranda* warnings were given and that a defendant waived his or her rights, "no evidence obtained as a result of [custodial] interrogation can be used against him [or her]."). Whether a defendant was in custody is determined by an objective inquiry:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. [*Id*. at 270 (citation and quotation marks omitted).]

Because the question of whether a defendant was in custody involves an objective inquiry, police officers and courts must "examine all of the circumstances surrounding the interrogation, including any circumstance that would have affected how a reasonable person in the suspect's

position would perceive his or her freedom to leave[.]" *Id*. at 270-270 (citations and quotation marks omitted). The subjective views of the interrogator and the person being questioned are irrelevant. *Id*. at 271.

Here, defendant drove himself to the police station, was not restrained in any way, and was told that he would not be arrested that day. Furthermore, the door of the interview room was not locked and defendant had a working knowledge of the English language. The trial court found that defendant was not in custody at the time of his interrogation, but failed to make a finding regarding whether defendant knew that the door to the interview room was unlocked and that he would not be arrested that day. The trial court did, however, find that defendant understood English well enough to waive his *Miranda* rights. Because defendant understood English well enough to knowingly and voluntarily waive his *Miranda* rights had he been in custody, it follows that he understood English well enough to understand that the door of the interview room was not locked and that he would not be arrested that day. Furthermore, defendant did not require any understanding of English to know that he drove himself to the police station and that he was not restrained in any way during the interview. Accordingly, based on the objective facts surrounding defendant's interview, he was not in custody, and the police were under no obligation under *Miranda* to advise him of his rights. Because *Miranda* was inapplicable, there is no presumption that the statements defendant made during the interview were involuntary. See *JDB*, 564 US at 268-269; *Cortez*, 299 Mich App at 691. Consequently, a motion to suppress the statements made by defendant during the interview would have failed. As such, defendant's trial attorney was not ineffective for failing to file a motion to suppress the statements defendant made in the interview. See *Ericksen*, 288 Mich App at 201 ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

III. CONCLUSION

Affirmed.

/s/ Patrick M. Meter
/s/ Colleen A. O'Brien
/s/ Jonathan Tukel