

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WESLEY JAMES DELANEY,

Defendant-Appellant.

UNPUBLISHED

October 13, 2022

No. 353529

Antrim Circuit Court

LC No. 19-004948-FC

Before: K. F. KELLY, P.J., and BORRELLO and CAMERON, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with intent to do great bodily harm, third-degree vulnerable adult abuse, torture, and two counts of assault with a dangerous weapon. Because defendant was denied the effective assistance of counsel regarding the presentation of his insanity defense, we vacate defendant’s convictions and remand for a new trial.

I. BASIC FACTS AND PROCEDURAL HISTORY

The facts of this case are largely not in dispute. Defendant, Wesley James Delaney, tackled his girlfriend to the ground, bit out a portion of her throat, followed her when she retreated into the garage, knocked her to the ground with a shovel, and tore out her hair. Defendant then went back into the house and retrieved a chainsaw, with which he threatened to kill both her and defendant’s disabled brother, whom defendant also injured during the assault.

Defendant’s girlfriend testified that after defendant bit her throat, he appeared shocked, asked if he had actually bitten her, and stated that she should call the police. She stated that she felt unable to call the police because she did not know what defendant would do. She also stated that she felt that she could not leave the house because she could not take defendant’s brother with her. She eventually called for help at a neighbor’s house.

At trial, defendant presented an insanity defense, arguing that he had posttraumatic stress disorder (PTSD), had “snapped,” and had been viewing himself as if from outside and unable to stop his assaults. The prosecutor objected to introducing the opinion of defendant’s expert witness, Dr. Wayne Simmons, into evidence on the basis that the opinion was formed from statements by

defendant that were not part of a doctor-patient relationship and were, therefore, hearsay. The prosecutor argued that defendant was required to testify about what he told the doctor in order for the facts on which the expert based his opinion to be admitted in evidence, as required by MRE 703.

Defense counsel responded that the facts could be introduced through questioning Dr. Simmons, because the statements were admissible under MRE 803(4).¹ The trial court ruled, however, that the statements were not admissible under MRE 803(4) because defendant was not treated by Dr. Simmons nor diagnosed in connection with treatment. The trial court ruled that, for Dr. Simmons to offer his opinion, the facts supporting the opinion had to be in evidence. Accordingly, the court ruled that defendant had to testify “or it’s got to be in evidence some other way.” As a result of the trial court’s ruling, defendant testified in order to provide the factual basis for Dr. Simmons’s opinion.

Because defendant testified, he was cross-examined. On cross-examination, the prosecutor questioned defendant extensively about his previous crimes, including his decision to plead guilty to them. These crimes included other assaultive offenses, including defendant attacking his mother and holding a knife to the throat of his then-pregnant girlfriend (not the victim in this case). During closing arguments, the prosecutor illustrated each of these incidents, including equating holding a knife to a woman’s neck as “the same thing as, like, holding a chainsaw.” The prosecutor argued at length that defendant’s account of his prior crimes was not credible and stated that defendant “has no details to discuss of what he did to his mother.”

The jury ultimately found defendant guilty of assault with intent to do great bodily harm, MCL 750.84(1)(a), third-degree vulnerable adult abuse, MCL 750.145n(3), torture, MCL 750.85(1), and two counts of assault with a dangerous weapon, MCL 750.82. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve concurrent terms of 20 to 50 years’ imprisonment for assault with intent to do great bodily harm, 10 to 15 years’ imprisonment for assault with a dangerous weapon, 5 to 15 years’ imprisonment for vulnerable adult abuse, and 30 to 50 years’ imprisonment for torture. This appeal followed.

II. STANDARD OF REVIEW

“A claim of ineffective assistance of counsel is a mixed question of law and fact.” *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). “A trial court’s findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.” *Id.* To preserve the issue of whether counsel rendered ineffective assistance, the defendant must move for a new trial or evidentiary hearing in the trial court or move for remand on appeal. *Id.* Because defendant did not preserve his claim of

¹ Under MRE 803(4), a statement is not excluded as hearsay if the statement is “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.”

ineffective assistance of counsel by failing to seek a *Ginther*² hearing in the trial court, this Court’s “review is limited to mistakes apparent on the record.” See *id.*

III. ANALYSIS

Defendant argues that his defense counsel’s failure to properly respond to the prosecution’s hearsay objection, which resulted in the trial court’s decision requiring defendant to testify, prejudiced defendant by exposing him to extensive impeachment, including questions regarding highly prejudicial previous assaults against his mother and then-girlfriend. We agree.

A. APPLICABLE LAW

A criminal defendant has a fundamental right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The United States Supreme Court has observed that the rights to counsel, due process, and a fair trial are intertwined:

[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. [*Strickland v Washington*, 466 US 668, 684-685; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

“To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the 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 Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). The defendant must overcome the strong presumption that defense counsel’s performance constituted sound trial strategy. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). In other words, the defendant must demonstrate that “counsel made an error so serious that counsel was not functioning as an attorney” *People v Briseno*, 211 Mich App 11, 16-17; 535 NW2d 559 (1995). “Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise.” *Petri*, 279 Mich App at 410.

Additionally, the United States and Michigan Constitutions guarantee a person the right to be protected from self-incrimination. US Const, Am V; Const 1963, art 1, § 17. “The privilege against self-incrimination permits a defendant to refuse to answer official questions in any other proceeding, no matter how formal or informal, if the answer may incriminate him or her in future criminal proceedings.” *In re Blakeman*, 326 Mich App 318, 333; 926 NW2d 326 (2018).

B. DEFICIENT PERFORMANCE

Defendant has demonstrated that his trial counsel’s performance fell below an objective standard of reasonableness. The prosecutor objected to the admission of Dr. Simmons’s opinion

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

on the basis that such testimony would be premised on hearsay and, therefore, not on facts available from the record. See MRE 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.”). According to the prosecutor, because Dr. Simmons’s opinion had to be made from facts in the record, defendant was required to testify to establish those background facts. Defense counsel responded that defendant’s statements to Dr. Simmons were not hearsay because they fell within the hearsay exception for statements made for the purposes of diagnosis and treatment, MRE 803(4), and that a defendant should not be required to testify in order to present an insanity defense. The trial court concluded that this hearsay exception did not apply and that defendant was required to testify to provide the factual basis for Dr. Simmons’s opinion.³

The facts of this case overlap considerably with *People v Yost*, 278 Mich App 341; 749 NW2d 753 (2008). There, the trial court declined to admit into evidence the opinion of a psychologist, Dr. Siroza VanHorn, who would have testified about the defendant’s intellectual functioning and other cognitive difficulties. *Yost*, 278 Mich App at 346. The prosecutor challenged the admission of Dr. VanHorn’s opinions “on the grounds that any opinion that VanHorn had must have been formed on the basis of inadmissible hearsay statements and, therefore, that she would not be able to offer an opinion under MRE 703.” *Id.* at 352. The court ruled that Dr. VanHorn could not testify about the defendant’s statements. *Id.*

The prosecutor also argued that, because Dr. VanHorn’s opinions were based on the defendant’s statements—which were inadmissible hearsay—she could not offer them. *Id.* For the defendant’s part, her trial counsel argued the statements were admissible under MRE 803(4), but the court ruled that the defendant failed to lay the foundation that the statements were offered for the purpose of medical treatment. *Id.* at 352-353. Thus, the court sustained the prosecutor’s objections, and Dr. VanHorn’s opinions were not offered to the jury. *Id.*

On appeal, we agreed with the trial court that the defendant could not rely on MRE 803(4) to admit evidence of an expert retained to evaluate the defendant, because the statements were not made for the purposes of treatment. *Id.* at 362. In order for Dr. VanHorn’s opinions to be admissible, the statements that the defendant made about her background and history, her answers to psychological testing, and the records of her previous treatment were required to be admissible. *Id.* at 363. However, even though VanHorn relied on the defendant’s responses, we stated that the fact that she relied on them “does not necessarily mean that [the] defendant had to offer the statements to prove the truth of the matters asserted.” *Id.* at 363. Thus, we held that the background information that the defendant provided to Dr. VanHorn was not hearsay:

Likewise, VanHorn may have been able to use the background information for evaluation without regard to the truth of the statements concerning defendant’s

³ We note that the trial court went to extensive lengths to attempt to address this issue correctly. The court offered the trial counsel a break to research the issue, then recessed for 30 minutes to research the issue itself. The trial court ultimately based its decision on MCL 768.20a(5), a statute regarding the disclosure of facts underlying expert opinions, and caselaw interpreting it. Had defense counsel raised the correct response to the prosecutor’s unfounded hearsay objection, the trial court likely would have properly ruled on the objection.

background. Therefore, to the extent that the tests and background information were not offered to prove the truth of the assertions made as part of the test or the truth of the background information, the tests and background information were not hearsay and the trial court erred in excluding them on this basis. [*Id.* at 364.]

Turning back to this case, the prosecutor offered the same erroneous objection as in *Yost* for the inadmissibility of Dr. Simmons’s testimony, and defense counsel relied on the hearsay exception that we explicitly rejected. Defense counsel clearly wanted to admit Dr. Simmons’s testimony without requiring defendant to testify. There is no legitimate strategic reason behind defense counsel’s failing to argue that defendant’s statements to Dr. Simmons were not hearsay. Instead, defense counsel argued that the statements were made in connection with medical treatment, a proposition that we rejected in *Yost*. Defendant ultimately agreed to testify to provide the factual basis to admit the expert report that supported his defense. Thus, by failing to properly respond to the prosecutor’s unfounded objection to the admission of Dr. Simmons’s testimony—on which defendant’s entire theory of the case relied—defense counsel’s performance “fell below an objective standard of reasonableness under the prevailing professional norms” See *Uphaus*, 278 Mich App at 185.

C. PREJUDICE

Defendant has also demonstrated that his trial counsel’s deficient performance prejudiced him. Because defendant testified, he was exposed to extensive questioning about otherwise inadmissible prior bad acts evidence, and there is a serious danger that the jury misused that evidence in this case.

“To find prejudice, a court must conclude that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). Generally, evidence of a defendant’s prior convictions creates the danger that the jury “will misuse prior conviction evidence by focusing on the defendant’s general bad character, rather than solely on his character for truth-telling.” *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). This Court will reverse a defendant’s conviction if evidence of the defendant’s prior conviction was not significantly probative concerning his credibility and the risk of prejudice is high because of the similarity of the offenses. See *People v Snyder*, 301 Mich App 99, 112; 835 NW2d 608 (2013).

In this case, the prosecutor did not cross-examine defendant solely regarding his background, but extensively questioned him about his previous crimes. Those crimes included assaulting his then-pregnant girlfriend with a knife in 1991, and assaulting his own mother in 1996. Had defendant not testified, he would not have been exposed to cross-examination about those crimes.

Further, this case heavily depended on credibility because the jury’s determination of defendant’s affirmative defense depended on whether the jury believed that defendant had PTSD or whether he was malingering. The prosecutor’s expert, Dr. Mary Judith Block, testified that it was believable that defendant had PTSD, but she would not diagnose him with it because she “didn’t trust that he wasn’t invested in exaggerating aspects in order to ameliorate his responsibility.” In contrast, Dr. Simmons did not believe that defendant’s explanation was

contrived or manipulative. Thus, defendant's credibility was integral to the case. We therefore conclude there is a strong possibility that counsel's defective performance affected the outcome of defendant's case.

In sum, it is clear from the record that, had defendant's counsel not performed ineffectively by failing to bring the correct law to the court's attention, the trial court likely would not have erroneously required defendant to testify. This defective performance prejudiced defendant because credibility regarding defendant's state of mind at the time of the offense was a determining factor for his insanity defense, and there was a high risk that the jury misused the evidence of defendant's prior assault convictions to determine that he had a general bad character, rather than focusing on the circumstances of the crimes in this case. We conclude that these circumstances undermined the reliability of the jury's determination regarding whether defendant had a mental illness, which was the primary issue in this case.

We therefore vacate defendant's convictions and remand for a new trial. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Thomas C. Cameron