STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2007
v	No. 267301 Tuscola Circuit Court
CORBIN AMIEL THOMAS, Defendant-Appellant.	LC No. 04-009251-FC

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty but mentally ill of committing four counts of assault with intent to murder, MCL 750.83. Defendant was sentenced to 23 years and 9 months to 60 years in prison, with credit for 526 days served on counts one, two, and three, and to 18 years and 9 months to 60 years in prison, with credit for 526 days served, on count four. Defendant appeals as of right, and we affirm.

I. FACTS

In June 2004, defendant was a patient at the Caro Center, a state-owned mental health facility. Defendant escaped from the center on around June 22, 2004. On June 25, 2004, at approximately 8:00 a.m., Patricia Colburn-Spencer arrived at Caro Learning Center, where she was employed as a teacher. The Caro Learning Center is an alternative school on the Caro Center's campus. Colburn-Spencer went to the library where three of her coworkers, Kristie Reh, Larry Gettel, and Sarah Cox, were gathered, and talked with Reh and Gettel. Reh left the group to make coffee in the break room and to retrieve her coffee mug from the kitchen. Reh noticed that the kitchen door was closed, which struck her as unusual because when no children were in the building, the door was typically left open. Reh pushed the door open, and stated that once it was open "all I could see was this big black thing, and all of a sudden I was on the ground." Initially, Reh was not sure if the attacker was a male or female, or even if it was human or an animal. According to Reh, it felt like the attacker was either stabbing her or striking her with a fist in her head. She curled into a fetal position, using her arms to protect her head, and screamed to warn her coworkers. Colburn-Spencer and Gettel heard Reh's screams, and Colburn-Spencer went to get help. Gettel saw someone in the hallway standing over Reh and striking her. Gettel did not notice much about the attacker's appearance except that it was a man with a distinctive hairstyle. Gettel put out his leg to stop the man, but the man knocked him

down and proceeded down the hallway, where Gettel's tool cart was stationed. The attacker took a hammer from the tool cart and continued down the hall and around a corner.

Gettel pursued the attacker. When he rounded the corner, Gettel saw the attacker hitting Colburn-Spencer in the head with the hammer. Gettel was able to knock the attacker away from Colburn-Spencer, but then the man began to hit Gettel in the head with the hammer. Gettel was briefly incapacitated, and the attacker moved further down the hall to the office where Cox had retreated during the commotion. Cox saw the man coming towards her and was able to get a good look at him; she identified him at trial as the defendant. Defendant then grabbed Cox on the arm, and when she freed herself he grabbed her again and raised his hand, which held a stick of some sort, as though to strike her. Cox pulled away from defendant again, and ran to the bathroom and locked herself inside. After Cox's escape from defendant, Gettel engaged him again and was able to wrest the hammer away from him after suffering additional blows to his head and body. Once Gettel had the hammer, defendant exited the building through the front door. Cox escaped from the building through the bathroom window and ran to her car to get help. Cox drove to the Caro Center, which dispatched people to help her coworkers at the Caro Learning Center.

On June 27, 2004, at about 6:00 a.m., Michigan State Trooper Tim Johnson got a call to assist in a search for defendant near the Caro Learning Center. Johnson, who also worked as a K-9 handler in his department, took his dog and began to search the woods along the river. As Johnson walked down a trail in the woods, his dog began "to giv[e] indications he was on an odor." The dog stopped about ten feet ahead of Johnson near a person who was lying on the ground on his back with garbage bags on top of him and papers, magazines, food wrappers, a pair of scissors, and a large ring of keys strewn around his body. Johnson testified that he "[made his] presence known" to the person, who did not react or respond in any way.

Following a jury trial, defendant was found guilty but mentally ill of four counts of assault with intent to murder. This appeal ensued.

II. ANALYSIS

On appeal, defendant raises two issues. First, defendant asserts that the evidence regarding the intent element of assault with intent to murder was not sufficient to sustain his convictions because he was legally insane at the time he committed the offenses. Therefore, according to defendant, the trial court should have sua sponte directed a verdict pursuant to MCR 6.419(A). In a related argument, defendant argues that the jury's verdict was against the great weight of the evidence and that the trial court failed to recognize that it possessed the authority to overturn the verdict. Defendant cites *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), for the proposition that due process requires the trial court to order a new trial if the verdict is against the great weight of the evidence. Second, defendant argues that he was denied effective assistance of counsel because defense counsel failed to move for a directed verdict, failed to object to the testimony of Dr. Donald Proux, and failed to meet with and properly prepare defense witness Dr. Firozza B. Van Horn.

A. Sufficiency of the Evidence-Directed Verdict

In his first argument, defendant makes the somewhat novel assertion that even though

defendant did not move for a directed verdict under MCR 6.419 based on the sufficiency of the evidence, the trial court nevertheless should have sua sponte directed a verdict of not guilty by reason of insanity on each of the relevant charges pursuant to MCR 6.419(A). Under MCR 6.419(A), the trial court is authorized to direct a verdict of acquittal if "the evidence is insufficient to support [the] conviction." Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). In reviewing the sufficiency of the evidence to support a conviction, this Court must decide whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987). "'When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.'" *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002), quoting *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Defendant argues that the trial court failed to recognize its authority to grant a directed verdict after stating on the record that "one could reasonably conclude that [defendant] was not in control of his faculties, and therefore maybe he should have been found not guilty by reason of insanity." It is true that under MCR 6.419(A), "the court on its own initiative *may* . . . direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction." (Emphasis added.) According to defendant, the evidence was insufficient to establish the intent element of the offense of assault with intent to murder because defendant presented evidence which established that he was legally insane at the time of the offense.

A criminal defendant is presumed sane. *People v Jones*, 151 Mich App 1, 5; 390 NW2d 189 (1986). However, legal insanity is an affirmative defense:

> It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . , that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity. [MCL 768.21a(1).]

MCL 768.21a(3) expressly provides that "[t]he defendant has the burden of proving the defense of insanity by a preponderance of the evidence." Thus, in order to establish that he was legally insane under MCL 768.21a(1), defendant was required to prove that he lacked the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law.

The burden of proving beyond a reasonable doubt each and every element of the crime charged is on the prosecution. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). However, sanity is not an element of assault with intent to commit murder, see *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995), and the prosecution is not shouldered with the burden of proving the failure of an affirmative defense, such as insanity. *Mette*, *supra* at 330.

As stated above, under MCL 768.21a(3), defendant bears the burden of proving insanity. The prosecution and defendant presented a substantial number of witnesses, from psychiatrists and psychologists to a sheriff's deputy, regarding the issue of defendant's sanity. In general, the prosecution's witnesses asserted that defendant was sane. A psychiatrist who treated defendant testified that he was not acutely mentally ill, as did a psychologist and forensic examiner who was also a medical doctor. In contrast, a sheriff's deputy who testified on behalf of defendant testified that defendant displayed bizarre behavior, and a board-certified psychologist who evaluated defendant on multiple occasions but who was not his treating mental health practitioner, testified that defendant was "clearly psychotic" and "insane." The jury heard all of this testimony and rejected defendant's insanity defense.

"[I]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Witness credibility and the weight accorded to evidence is a question for the jury, and any conflict in the evidence must be resolved in the prosecution's favor. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). In this case, the jury heard the evidence regarding defendant's sanity, and rejected defendant's insanity defense. "The jury is the ultimate judge of [a] defendant's sanity at the time of the crime . . . ." *People v Krugman*, 377 Mich 559, 563; 141 NW2d 33 (1966). In light of the testimony of the prosecution's witnesses indicating that defendant was sane, not only was the trial court correct in not sua sponte directing a verdict, it would have been error for the trial court to direct a verdict because weighing the evidence regarding defendant's sanity or lack thereof and determining the credibility of the witnesses who were testifying regarding defendant's sanity were questions for the jury, not the court.

B. Great Weight of the Evidence-New Trial

Defendant also argues that the verdict was against the great weight of the evidence. Defendant failed to preserve this issue because he did not raise it in a motion for new trial before the trial court. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, our review of this issue is limited to whether there was plain error affecting defendant's substantial rights. *Id.*; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant cites *Lemmon*, *supra*, in support of his argument that the verdict was against the great weight of the evidence. Although defendant did not argue before the trial court and does not now argue on appeal that he should receive a new trial, he relies on *Lemmon*, which states that a new trial may be granted if the verdict is against the great weight of the evidence. *Lemmon*, *supra* at 635. MCR 2.611(C) provides that "the court on its own initiative may order a new trial for a reason for which it might have granted a new trial on motion of a party." Included in the grounds for a new trial is "[a] verdict or decision against the great weight of the evidence or contrary to law." MCR 2.611(A)(1)(e).

The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Musser*, *supra* at 218-219. The basis of defendant's argument is that the evidence regarding defendant's sanity preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. In general, the testimony of defendant's witnesses on the issue of defendant's sanity conflicted with the

testimony of the prosecution's witnesses who testified regarding defendant's sanity. As explained above, for defendant, a sheriff's deputy testified that defendant displayed bizarre behavior, and a board-certified psychologist, who evaluated defendant on multiple occasions but who was not his treating mental health practitioner, testified that defendant was "clearly psychotic" and "insane" at the time of the attacks. On the other hand, several witnesses, including a psychiatrist who regularly worked with defendant and a psychologist and forensic examiner who was also a medical doctor, testified that defendant was not suffering from acute mental illness at the time of the offenses and was aware of his actions. Although the testimony was conflicting regarding the issue of defendant's sanity, conflicting testimony is an insufficient ground for granting a new trial. *Id.* at 219. Furthermore, we conclude that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Therefore, we find no plain error affecting defendant's substantial rights.

C. Effective Assistance of Counsel

Defendant also contends that trial counsel was ineffective, thereby denying him a fair trial. Although defendant raised the issue whether trial counsel was ineffective in a motion for remand before this Court, he did not move for an evidentiary hearing or a new trial based on ineffective assistance of counsel in the trial court. Therefore, the issue is not preserved, and this Court's review is limited to mistake apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The facts and law are reviewed, respectively, for clear error and de novo. *Id*. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant first argues that defense counsel was ineffective because he failed to move for a directed verdict even when the trial court expressed reservations about defendant's guilt. We reject this argument based on our conclusion that the trial court did not err in not directing a verdict in favor of defendant, and we observe again that it would have been error for the trial court to direct a verdict in defendant's favor in this case.

Defendant also argues that trial counsel should have objected to the testimony of Dr. Donald Proux, which defendant asserts improperly bolstered the credibility of Dr. Arthur Rosenburg, a medical doctor and forensic psychologist who testified on behalf of the prosecution, and attacked the credibility of defense witness Dr. Van Horn. Proux worked at the Caro Center as a contract psychiatrist whose role was to evaluate patients for the purpose of testifying in court on behalf of their treating physician, in part to ensure that such duties would not interfere with the staff physicians' ability to spend their time treating patients. Proux met with defendant and determined that he saw no evidence of acute mental illness; Proux believed that defendant appeared to be "very self confident" and looked "very organized and together." Defendant specifically objects to the portion of Proux's direct testimony concerning his opinions of the evaluations of both Drs. Rosenburg and Van Horn, which is as follows:

> *Q*. Did you have an opportunity, Doctor, to review the reports of Doctor Rosenburg . . . as well as Doctor Van Horn?

A. Yes I did.

* * * *

Q. Did you evaluate the conclusions then of the two individuals and the basis for those conclusions?

A. Yes. Obviously Doctor Rosenburg's report was more coherent and logical, and had a flow to it. . . . [H]is opinion . . . was more credible to me, and I happened to agree with him.

When asked what the differences were between Van Horn's and Rosenburg's descriptions of defendant's reports of delusions, Proux responded that he believed Van Horn had "copied part of . . . Rosenburg's report . . . , and it wasn't as coherent as his because she left things out." Defendant also argues on appeal that defense counsel should have objected to Proux's "anecdotal" stories about defendants with mental illness who want to outsmart the system by escaping responsibility for their crimes.

When asked to give his opinion about Dr. Rosenburg and Dr. Van Horn's reports, Proux responded that he thought that Rosenburg's report was more compelling than Van Horn's. We disagree with defendant's claim that this testimony improperly bolstered Rosenberg's testimony and preemptively attacked Van Horn's credibility. Proux was certified as an expert in the area of forensic psychiatry pursuant to MRE 702. As such, he was qualified to offer an opinion on the reports of the other expert witnesses, and defense counsel's objection to this opinion would likely have been in vain. "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). We are also not persuaded that Proux's statements suggesting that a guilty but mentally ill verdict is appropriate for defendants who want to outsmart the system by escaping responsibility for their crime were prejudicial. Therefore, any objection to these comments would have also been futile.

Next, defendant argues that trial counsel failed to adequately prepare his expert witness, Dr. Van Horn, by neglecting to provide her with all the materials she needed to consider prior to testifying at trial and by failing to meet with her before trial. In particular, defendant claims that counsel did not provide Dr. Van Horn with a videotape of defendant responding to police questions following his arrest on June 27, 2004. Further, defendant states that trial counsel failed to adequately consider the relevance of the videotape and its role in the prosecution's argument. However, defendant does not claim that the jury's verdict turned upon the contents of the videotape, nor does he argue that or how he was prejudiced by his counsel's asserted failure to appreciate its importance to the prosecution's case. A defendant must show that he was prejudiced by counsel's defective performance in order to effectively claim ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Prejudice results if, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.*

Defendant claims in essence that Dr. Van Horn's testimony was defective because she had not considered and used the videotape in preparing for trial. She testified as an expert in the

area of forensic psychology that defendant was experiencing an intense period of psychosis at the time of the offenses based on her meetings with him. The fact that counsel did not provide her with the videotape of some of defendant's post-arrest statements does not negate the importance of Dr. Van Horn's testimony, nor does defendant suggest that this was the case. In addition, we reject defendant's argument that counsel's failure to meet with Dr. Van Horn shows a lack of preparation. The failure to interview witnesses does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *Id.* Defendant does not allege what information or evidence that better preparation of Dr. Van Horn would have elicited. Therefore, defendant has not overcome the presumption that defense counsel's representation of defendant was effective.

Affirmed.

/s/ William C. Whitbeck, C.J.
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello