Order

Michigan Supreme Court
Lansing, Michigan

March 18, 2022

Bridget M. McCormack,
Chief Justice

161324

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161324
COA: 348831
Allegan CC: 18-021494-FC

DEREK JEFFREY MESHKIN,
Defendant-Appellant.

_____/

On January 13, 2022, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we VACATE the Court of Appeals opinion and REMAND this case to the Allegan Circuit Court for a new trial.

When a witness testifies to the good character of the defendant in a criminal case, MRE 405(a) permits cross-examination of the witness about specific instances of conduct that might call into question the defendant's reputation for honesty and integrity. The purpose of this cross-examination is to test the credibility of the character witness and help the fact-finder determine what weight to give the witness's testimony. *People v Dorrikas*, 354 Mich 303, 316-317 (1958). Though trial courts have wide discretion in evaluating such inquiries, " '[w]ide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse.' " *Id*. at 318, quoting *Michelson v United States*, 335 US 469, 480 (1948). We have been clear about the trial court's responsibilities in this regard, saying these inquiries should not be made without:

> (1) the trial judge determining, in the absence of the jury, whether or not the criminal acts actually took place, the time of their commission, and a determination as to whether they were relevant to the issue being tried, and (2) the trial judge making a careful instruction to the jury as to the reasons testimony as to the criminal acts is being admitted. [*Id*. at 326.]

These steps must be followed to ensure counsel is not " 'taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box.' " *Id*. at 321, quoting *Michelson*, 335 US at 481.

Defendant presented a character witness at trial, and on cross-examination, the prosecutor asked this witness if it was true that defendant had committed a previous sexual assault. The trial court did not determine whether there was any factual basis to support the question, the prosecution did not offer any, and the trial court did not instruct the jury as to the reasons why such a question was permissible. Inquiries of this type, without any basis in fact and without any of the necessary protections afforded by the trial court, are improper. *Dorrikas*, 354 Mich at 317-318, 326-327; *People v Whitfield*, 425 Mich 116, 131-133 (1986). The trial court erred by allowing a " 'groundless question to waft an unwarranted innuendo into the jury box.' " *Dorrikas*, 354 Mich at 321, quoting *Michelson*, 335 US at 481.

Defendant tried to offer testimony to show the falsity of the suggestion inherent in the prosecution's question, but the trial court excluded the testimony. Defendant argues that this denied him his constitutional right to a fair trial. We agree. Given that this case "essentially boiled down to whether the complainant's allegations" were true, *People v Armstrong*, 490 Mich 281, 293 (2011), this error was not harmless beyond a reasonable doubt, *People v Anderson*, 446 Mich 392, 404-406 (1994).

Defendant also argues that he was denied his constitutional right to present a defense because the trial court excluded his proposed expert from testifying that the complainant suffered from Reactive Attachment Disorder (RAD). While we need not reach this question in light of our holding that defendant is entitled to a new trial on the basis of the prosecution's improper cross-examination, we address the admissibility of this expert testimony because it is likely to arise on retrial. In excluding the evidence, the trial court reasoned, "I think the prejudicial nature of the evidence would be to mislead the jury to believe that everyone that has RAD lies about everything they say." But defendant's offer of proof states that his expert would confine his testimony to "the relevant facts of the Reactive Attachment Disorder diagnosis" and refrain from any "evaluative statements regarding the veracity of [the complainant's allegations], the accuracy of diagnoses, or any other facet related to the facts of this case." And the prosecution has conceded that this evidence is not categorically inadmissible.

Expert testimony related to a complainant's background is often admissible, so long as the expert does not opine on whether the complainant is being truthful. *People v Peterson*, 450 Mich 349, 373-375 (1995). While RAD may present a trial court with a more difficult challenge than other types of expert testimony, other jurisdictions appear to navigate this complexity. See *Large v State*, 177 P3d 807, 817-818 (Wy, 2008); *Darst v State*, 323 Ga App 614, 622-623 (2013); *State v Weisbarth*, 384 Mont 424, 425-429 (2016); *State v Salsbery*, 4 Wash App 2d 1023 (2018). On retrial, if the parties seek to

admit expert testimony, the trial court can conduct a *Daubert* hearing to ensure that the proposed testimony is both relevant and reliable as is required under MRE 702. See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993); *People v Tomasik*, 498 Mich 953 (2015). The scope of the expert's testimony, if admissible, could also be determined by the court in advance to address the potential prejudice from any specific testimony.

We do not retain jurisdiction.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK JEFFREY MESHKIN,

Defendant-Appellant.

UNPUBLISHED
April 30, 2020

No. 348831
Allegan Circuit Court
LC No. 18-021494-FC

Before: MARKEY, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b) (sexual contact by an individual at least 17 years old against a victim under 13 years old), one count of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a, and one count of indecent exposure, MCL 750.335a. The trial court sentenced defendant to concurrent prison terms of 57 to 180 months for each count of CSC-II and one year of imprisonment for his accosting a child for immoral purposes and indecent exposure convictions, with credit for one day served. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant and his wife, Katie Meshkin (Katie),[1] adopted AM and her biological brother from the foster care system in 2012. In 2017, AM told a friend at school that defendant had sexually abused her. Her friend told her parents, who informed AM's school. A few days later, Children's Protective Services (CPS) removed AM and her brother from defendant's home. Defendant was arrested and charged on the basis of AM's allegations.

Before trial, defendant sought to introduce expert testimony regarding AM's history of trauma and diagnosis of reactive attachment disorder (RAD), arguing that "RAD is basically an attempt by the child to control the child's environment. That's why it so frequently involves a

[1] Due to the commonality of surnames, we will refer to certain persons by their first names.

claim of some type of sexual or inappropriate parental conduct so that the child can get into a different setting." Defendant provided the prosecution and the trial court with a letter written by defendant's proposed RAD expert, Dr. Daniel Post, who explained that the symptoms of RAD included "indiscriminate affection towards strangers, lack of affection with parents, lying about the obvious, stealing, destructive behaviors of self and other impulse control challenges, hyperactivity, lack of conscience, and limited ability for deep attachments to anyone." Defendant also sought to introduce evidence that AM had been sexually abused by a relative as well as a babysitter before entering into defendant's care.

The prosecution filed a motion in limine to exclude Dr. Post's testimony regarding RAD and all testimony concerning prior sexual abuse AM had suffered. The trial court granted the motion, stating:

> I think the prejudicial nature of the evidence would be to mislead the jury to believe that everyone that has RAD lies about everything they say.
>
> And I'm very grateful that Mr. Post was honest in giving his opinion and stating that caution must be taken when applying these broad diagnostic correlations and that's exactly what the Court feels is the risk of allowing his testimony. That it would mislead the jury and that his testimony would be misconstrued. And because simply stating that it's plausible that she could lie because of her disorder isn't helpful to the jury because it's plausible that everyone lies. I think this Court and all the attorneys who are present have enough experience to know that we see people lie every day. And simply because [AM] has been diagnosed with RAD doesn't mean that she is lying and that's exactly what Doctor Post said.

At trial, AM testified that defendant anally penetrated her in 2013, when she was eight years old. AM testified that defendant had put "his private in [her] private," and that Katie had not believed her and had punished her by taking her toys away. AM also testified that over a four-year period (when she was between eight and twelve years old) defendant had repeatedly grabbed her breasts, vagina, and buttocks and showed her pornography. Additionally, AM testified to an incident in which defendant gave her money to touch his penis, and another incident in which defendant exposed his penis to her and asked her to perform oral sex on him, which AM refused. AM also testified that at some point in 2017, defendant came into her bedroom and placed his penis on her underwear above her vagina. AM testified that a lock was placed on her door after the bedroom incident, and that Katie was the only person who had the key.

At trial, the prosecution introduced Rhiannin Hamer (Hamer), defendant's sister-in-law, as a witness and questioned her about AM's behavior and demeanor since leaving defendant's home. Hamer testified that AM and her biological brother were then living with her and that AM's grades had improved since she left defendant's home. When the prosecution asked Hamer why her relationship with Katie had deteriorated since AM's disclosure of defendant's abuse, Hamer responded by stating "I'm assuming its [sic] because of the situation and because I believe [AM]." Defense counsel objected, and the trial court determined that Hamer had inappropriately commented on AM's credibility. Therefore, the trial court instructed the jury "not to consider the last statement that was made by the witness with regards to the credibility of the complaining

witness." Subsequently, in response to the prosecution's question regarding how the incident had affected AM since AM had come to live in her home, Hamer stated that AM had "learned to open up and trust and it wasn't like that right away." Defense counsel again objected and moved for a mistrial, arguing that no jury instruction could cure the prejudice caused by Hamer's statements because the entire case was a credibility contest. Defense counsel also argued that, at a minimum, he should be allowed to introduce evidence of AM's RAD diagnosis to counter Hamer's testimony. The trial court determined that a mistrial was not warranted and rejected defendant's argument that Hamer's testimony opened the door to testimony regarding AM's diagnosis, but repeated that Hamer could not comment on AM's credibility and offered to give an additional instruction to the jury regarding Hamer's statements.[2] After the trial court's ruling, defense counsel chose not to request an additional jury instruction on the matter because he thought that it would further highlight the issue and cause the jury to attach greater significance to Hamer's testimony.

Defendant called his father, Albert Meshkin (Albert) as a character witness, who testified that defendant's relationship with AM appeared to be normal and loving, and that he never suspected anything inappropriate. On cross-examination, the prosecution asked Albert the following questions:

> *Q.* Isn't it true that [defendant] fondled his sister about ten years ago?
>
> *A.* He did what?
>
> *Q.* Was he fondling his sister?
>
> *A.* [Defendant] was fondling his sister?
>
> *Q.* [Katie]'s sister?
>
> *A.* No.
>
> *Q.* You never heard that?
>
> *A.* No.

In response to the prosecution's questions, defense counsel requested that the trial court allow him to introduce the testimony of defendant's sister and sister-in-law that defendant had never fondled them. The trial court denied defense counsel's request.

During trial, defense counsel also requested that Katie be allowed to testify that AM had not told her that defendant had anally penetrated her in 2013, but had instead told her that defendant

[2] It does not appear that the trial court specifically struck from the record Hamer's statement that AM had opened up and learned to trust. The trial court stated that Hamer, as a lay witness, was permitted to give her perceptions of how AM had adjusted since coming to live with her, and offered to give an additional limiting instruction to the jury concerning her testimony, which defense counsel declined.

put his fingers in her mouth; further, according to Kate, AM had eventually admitted that she had lied about defendant putting his fingers in her mouth and that Katie had punished her for lying. The trial court determined that Katie could testify that she punished AM for lying about the 2013 incident, but could not testify to any specific statements that AM had made to her because such statements constituted inadmissible hearsay.

The jury convicted defendant as described. At a bond hearing after defendant was convicted, Dr. Arnold Coran testified that he had helped perform a tracheostomy on defendant after defendant ruptured his trachea in a car accident. Dr. Arnold testified that defendant required careful monitoring 24 hours per day because something might clog or block his trachea and cause him to be unable to breathe. Albert and Katie were trained by doctors to handle defendant's trachea tube, and one of them needed to be with defendant at all times. Because the Allegan County jail did not always have medical staff on site, the trial court revoked defendant's bond and placed him under house arrest with an electronic tether so that defendant could continue receiving his necessary medical care until sentencing.

At sentencing, defense counsel argued that defendant's medical condition provided a compelling and substantial reason for the trial court to impose an out-of-guidelines, noncustodial sentence, and further that a prison sentence would violate defendant's rights under the Eighth Amendment to the United States Constitution. Defendant's presentence investigation report (PSIR) recommended a prison sentence, stating that a hospital owned and operated by the Michigan Department of Corrections (MDOC) was capable of handling defendant's medical care; a hospital staff member had informed the agent who prepared the report that the hospital had "housed other inmates in the past that had tracheostomies" and had "an attached 24/7 medical facility that is capable of dealing with any emergencies that may occur." After considering defendant's medical condition at sentencing, the trial court found that MDOC would be able to properly care for defendant and imposed a prison sentence within defendant's minimum sentencing guidelines range.

This appeal followed.

II. EXCLUSION OF EVIDENCE

Defendant argues that the trial court erred by excluding (1) defendant's proffered expert testimony regarding AM's RAD diagnosis and past traumatic experiences, (2) testimony from Katie regarding AM's alleged inconsistent statements regarding the sexual abuse incident in 2013, and (3) testimony from defendant's sister and sister-in-law that defendant had never "fondled" them. We disagree. We review de novo preliminary issues of law and review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes. *Id.* "Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial." *Id.* In determining whether an evidentiary error warrants reversal, this Court "should focus on the nature of the error in light of the weight and strength of the untainted evidence." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

A witness who is qualified "by knowledge, skill, experience, training, or education" may offer expert testimony if the court determines that the expert's "recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. Expert testimony is only relevant and admissible if it helps the jury understand evidence or determine an issue of fact. *People v Beckley*, 434 Mich 691, 713-714; 456 NW2d 391 (1990). However, relevant expert testimony may still be excluded if the testimony would confuse or mislead the jury or its probative value would be "substantially outweighed by the danger of unfair prejudice." MRE 403. Additionally, "it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *People v Musser*, 494 Mich 337, 349; 835 NW2d 319 (2013). Credibility determinations are to be made by the jury, not another witness. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

In this case, the trial court determined that the prejudicial nature of Dr. Post's expert testimony regarding AM's diagnosis would mislead the jury to believe that AM could not be believed. According to Dr. Post's letter, he was prepared to testify that the symptoms of a RAD diagnosis included "a propensity to lie, reduced conscious, and variable attachments to others." Because the expert testimony could have been viewed by the jury as opining that AM was predisposed to lie and was not credible, we conclude trial court did not abuse its discretion by excluding the testimony. See *Musser*, 494 Mich at 349. Moreover, although defendant argued that Dr. Post would not testify that AM was being untruthful or that the abuse did not occur, the trial court noted that "simply stating that it's plausible that [the victim] could lie because of her disorder [would not] be helpful to the jury because it's plausible that everyone lies." Therefore, to the extent Dr. Post's testimony would *not* have commented on the AM's credibility, that testimony would not have aided the jury in understanding evidence or determining an issue of fact, see *Musser*, 494 Mich at 349; *Beckley*, 434 Mich at 713-714; MRE 702, yet it carried a substantial risk of prejudice, MRE 403. Because the decision to exclude Dr. Post's expert testimony did not fall outside the range of principled outcomes, the trial court did not abuse its discretion. See *Musser*, 494 Mich at 349; *Benton*, 294 Mich App at 195; *Beckley*, 434 Mich at 713-714.[3]

Defendant also cursorily argues that the trial court erred by limiting Katie's testimony regarding specific statements AM had allegedly made after the 2013 sexual abuse incident. Defendant has not provided any authority in support of this argument, and has therefore abandoned it. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."). Defendant does not explain why the trial court's holding that the statements were hearsay was erroneous, and we will not endeavor to discover and rationalize the basis of this claim

[3] Regarding the trial court's exclusion of the AM's past traumatic experiences and prior sexual abuse, defendant only sought to introduce such evidence to explain why AM was diagnosed with RAD as "part of the underpinning" for defendant's proposed expert testimony. Therefore, when the trial court excluded Dr. Post's testimony regarding RAD, it did not abuse its discretion by also excluding evidence that defendant sought to introduce for the purpose of explaining AM's RAD diagnosis. *Benton*, 294 Mich App at 195.

on his behalf. *Id.* Moreover, the trial court noted that defense counsel had the opportunity to question AM on cross-examination regarding the alleged inconsistent statement, but chose not to do so. A witness's prior inconsistent statements may be introduced if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." MRE 801(d)(1); see also MRE 613(b) ("[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same.") The trial court's decision to excluded Katie's testimony regarding the AM's statements did not fall outside the range of principled outcomes. *Benton*, 294 Mich App at 195.

Defendant also argues that the trial court erred by excluding the testimony of defendant's sister and sister-in-law that he had never fondled them. We disagree. Defendant presents no specific argument regarding why this testimony was admissible, but merely asserts that the testimony was necessary to address the "issue" of fondling raised by the prosecution. See *Kelly*, 231 Mich App at 640-641. Defendant has therefore "fail[ed] to rationalize the basis of his argument." *People v Solloway*, 316 Mich App 174, 198; 891 NW2d 255 (2016). In any event, the prosecution's questions are not evidence. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540-541; 775 NW2d 857 (2009). The prosecution asked Albert whether he had heard that defendant had fondled his sister or Katie's sister 10 years before the trial, and Albert responded that he had not. There was no evidence for defendant to rebut with additional testimony, and the trial court was within its rights to decline to permit additional testimony on this non-issue on the ground that it was not relevant. MRE 401.

Moreover, the trial court instructed the jury that the prosecution's questions were not evidence. Jurors are presumed to follow their instructions. *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). The only "evidence" on this issue admitted at trial was Albert's unequivocal denial that he had ever heard that defendant had fondled his sister or sister-in-law. Defendant cannot show that he was prejudiced by the trial court's refusal to allow additional testimony on the matter. *Benton*, 294 Mich App at 195.

Additionally, because the trial court's exclusion of evidence was not erroneous, it did not deny defendant his constitutional right to present a defense. The right of a criminal defendant to present a defense is protected under the state and federal constitutions. *Solloway*, 316 Mich App at 198. However, the right to present a defense is not absolute, and a defendant must still comply with the rules of evidence and procedure. *Id.* Consequently, "the right to present a defense extends only to relevant and admissible evidence." *Id.* (quotation marks omitted). Because we conclude, for the reasons discussed, that the trial court did not err by determining that the evidence in question was inadmissible, defendant was not denied his right to present a defense.

III. DENIAL OF DEFENDANT'S MOTION FOR MISTRIAL

Defendant also argues that the trial court erred by denying his motion for a mistrial on the basis of Hamer's improper testimony. We disagree. We review for an abuse of discretion a trial court's denial of a motion for a mistrial. *People v Dickinson*, 321 Mich App 1, 18; 909 NW2d 24 (2017). A trial court should only grant a defendant's motion for a mistrial when an error prejudices the defendant and affects his right to a fair trial. *Id.* The party moving for a mistrial "must establish that the error complained of is so egregious that the prejudicial effect can be removed in no other

way." *Id*. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

In this case, the trial court granted defendant's objection regarding Hamer's testimony that she believed AM, struck the statement from the record, and instructed the jury to disregard Hamer's testimony with respect to AM's credibility. See *Musser*, 494 Mich at 349; *Dobek*, 274 Mich App at 71. With regard to defendant's motion for a mistrial, the trial court noted that Hamer's statement that she believed AM was made in response to the prosecution's question regarding why she was no longer best friends with Katie, and that Hamer's statement that AM had learned to open up and trust her was an isolated response to the prosecution's questions about behavioral changes in AM since she left defendant's care.

We agree with the trial court that Hamer's statements were voluntary, isolated, or unresponsive answers to the prosecutor's proper questions and were not grounds for a mistrial. See *Haywood*, 209 Mich App at 228.[4] Further, the trial court immediately instructed the jury not to consider Hamer's statement that she believed AM, and defense counsel declined an additional instruction after Hamer made the second challenged statement. Because jurors are presumed to follow instructions, any prejudice arising from Hamer's first statement was presumably cured by the trial court's instruction in this case. *Petri*, 279 Mich App at 414. Defendant could have accepted the trial court's offer to provide an additional instruction after Hamer's second statement, but did not. Any prejudice arising from the lack of an additional instruction regarding Hamer's second statement is not attributable to the trial court. See *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (noting that "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence"). We hold that the trial court did not abuse its discretion by denying defendant's motion for a mistrial. *Dickinson*, 321 Mich App at 18.

IV. CUMULATIVE ERROR

Defendant argues that the cumulative effect of the trial court's errors denied defendant a fair trial. We disagree. As discussed, we find no merit to defendant's claims of error at trial. A claim of cumulative error does not merit reversal when no errors have been established. *Dobek*, 274 Mich App at 106.

V. SENTENCING

Defendant argues that the trial court's sentences for CSC-II were disproportionate, and that his constitutional right to receive medical treatment was violated by the prison sentences imposed by the trial court. We disagree in both respects.

Under MCL 769.34(10), "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing

[4] For the sake of argument, we will assume that Hamer's statement that AM had learned to open up and trust Hamer qualified as improper vouching for AM's credibility; however, we note that a witness expressing her opinion that another witness has "learned to trust" is not necessarily the same as opining that the witness is "trustworthy."

absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Defendant argues that we may review defendant's within-guidelines sentences for proportionality notwithstanding MCL 769.34(10), because the statute was invalidated by our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). We disagree. This Court has held that *Lockridge* "did not alter or diminish MCL 769.34(10)." *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016). Because this Court is bound by its own published decisions, MCR 7.215(J)(1), we must continue to affirm within-guidelines sentences under MCL 769.34(10) "unless there was an error in scoring or the trial court relied on inaccurate information." *Schrauben*, 314 Mich App at 196. Defendant does not argue that there was a scoring error or that the trial court relied upon inaccurate information, but merely argues that the trial court should have imposed more lenient sentences; we therefore affirm his within-guidelines sentences. See *id*.

However, MCL 769.34(10) does not bar this Court's from reviewing a claim that defendant's constitutional rights were violated by a particular sentence. *People v Conley*, 270 Mich App 301, 317; 715 NW2d 377 (2006). Defendant's argument that his prison sentence violated his Eighth Amendment constitutional right to receive medical treatment is such a claim. "Constitutional questions are reviewed de novo." See *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

A prison inmate has a constitutional right under the Eighth Amendment to receive adequate medical care. *Johnson v Wayne Co*, 213 Mich App 143, 152-153; 540 NW2d 66 (1995); US Const, Am VIII. However, defendant failed to establish at trial, and fails to establish on appeal, that MDOC is unable to provide defendant with adequate medical care. See *Solloway*, 316 Mich App at 198; *Kelly*, 231 Mich App at 640-641. Defendant asserted before the trial court that his tracheal tube required him to have trained medical staff available 24 hours per day. MDOC stated that it would place defendant in a facility that had such care available and that it had previously housed other inmates with tracheal tubes. Defendant has presented no evidence that this was insufficient to meet his medical needs, and has failed to establish that his constitutional rights were violated.[5]

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Mark T. Boonstra

[5] Defendant does not assert that he has in fact received inadequate medical care for his specific needs since his incarceration at an MDOC facility.