STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES FLEMING,

Defendant-Appellant.

UNPUBLISHED
April 29, 2021

No. 353115
Wayne Circuit Court
LC No. 19-003156-01-FC

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

PER CURIAM.

Defendant, James Fleming, appeals as of right his bench trial convictions of two counts of second-degree murder, MCL 750.317; two counts of felonious assault, MCL 750.82; assault with intent to murder (AWIM), MCL 750.83; felon in possession of a firearm (felon-in-possession), MCL 750.224f; and six counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1).[1] The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for each of his second-degree murder convictions and his AWIM conviction, 1 to 4 years' imprisonment for each of his felonious assault convictions, 1 to 5 years' imprisonment for his felon-in-possession conviction, and two years' imprisonment for each of his felony-firearm convictions. On appeal, defendant argues that the trial court erred in denying his request to represent himself at trial, and that his trial counsel was ineffective for failing to timely provide him with discovery and petition the trial court for DNA, ballistics, and fingerprint experts. We affirm.

[1] The trial court acquitted defendant of two counts of first-degree murder, MCL 750.316(1)(a), two counts of AWIM, kidnapping, MCL 750.349, and second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(C).

I. FACTS AND PROCEDURAL BACKGROUND

This case arises from a physical altercation and double-murder that occurred at a Detroit apartment building in 2018. Nikea McKay and defendant met about six months before the incident and became friends. On the night of the incident, McKay sent defendant a text message asking to get together and smoke marijuana. Defendant agreed, picked up McKay from her house, and took her back to his apartment, where they socialized, consuming alcohol, marijuana, and cocaine. Defendant testified that, at one point, the cocaine began to blur his vision.

At trial, McKay and defendant provided different versions of what transpired in defendant's apartment. Nevertheless, McKay testified that, at some point during the evening, she heard defendant say he wanted, in her words, to "tie [her] down, beat [her] and rape [her]. And he was getting up going to get the rope." McKay said she then went into the kitchen and got a knife, and that defendant followed and grabbed a bigger knife out of the sink. He tried to take McKay's knife away from her, but cut his hand in the process.

McKay fled to the first floor of the apartment building, wearing only a shirt. She ran into a woman, Ivana Williams, and a security guard, Gaurice Green, who attempted to calm her down. Meanwhile, defendant grabbed his gun, went down the stairs, and walked out the front doors of the apartment building. Defendant attempted to come back inside less than a minute later, but the doors were locked. As security guard, Kenneth Hall, went to open the front door for defendant, defendant pulled the gun from his pocket and shot Hall. Defendant testified that he had regained his vision while outside and suddenly saw Hall and another resident, Bernice Clark, in front of him "[a]nd reflectively [sic] I, reflex action I just shot twice and shot two people. It was a reflex action." When McKay heard the gunshots, she, Green, and Williams ran out a side door in the apartment building's community room. Williams and Green testified that defendant shot at them as they ran out the door. Williams ran for help to a police car parked down the street. Defendant testified that he saw Williams and fired at her, intending to kill her. He then got in his car and left the scene.

Police found Hall's body in the parking lot of the apartment building, and Clark's body in the first-floor hallway. Also recovered from the scene were a bullet from a desk in the lobby, shell casings in the community room, and blood on the front doors to the apartment building, the hallway leading to the stairs, and on the door to defendant's apartment. Five days later, defendant was arrested in Virginia with a .357 magnum caliber revolver.

The prosecution presented two experts relevant to this appeal. Forensic scientist Andrea Young performed a DNA analysis on the swab samples collected from the blood recovered at the scene. Young concluded there was "very strong support" that defendant's DNA was on the walls of the seventh-floor stairway, the first-floor stairway, the community room, the parking lot sidewalk, the front door of the apartment building, shell casings found on the first floor, and the gun recovered from defendant. Detective Sergeant Dean Molnar, a ballistics expert, examined the gun recovered from defendant, shell casings recovered from the apartment building, and fired bullets recovered from Hall, Clark, and the desk in the lobby. Detective Molnar concluded that the bullet recovered from Hall and the shell casings matched defendant's type of gun; however, the other bullets were inconclusive because of the damage on impact.

Defendant testified at trial, admitting that he shot Hall and Clark, but claiming they were outside the apartment building when he shot them as a "reflex." Defendant also admitted he shot at Williams three times in the parking lot, intending to kill her. Defendant denied trying to kill McKay. Additionally, defendant stated that the shell casings, other bullets, and blood found at the scene were not his, but were planted by Detroit police officers.

At the conclusion of the bench trial, defendant was convicted as described above, and later sentenced as indicated.

II. ANALYSIS

A. SELF-REPRESENTATION

Defendant first argues that the trial court erred in denying his request to represent himself at trial. We disagree.

We review a trial court's decision on a defendant's request to represent himself for an abuse of discretion. *People v Daniels*, 311 Mich App 257, 265; 874 NW2d 732 (2015). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. See *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). We review for clear error the trial court's factual findings surrounding a defendant's waiver of the right to assistance of counsel. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). To the extent the trial court's decision "involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *Id*.

The United States and Michigan Constitutions guarantee a criminal defendant's right to self-representation. US Const, Am VI; Const 1963, art 1, § 13. However, the right to self-representation is not absolute. *Indiana v Edwards*, 554 US 164, 171; 128 S Ct 2379; 171 L Ed 2d 345 (2008); see *Daniels*, 311 Mich App at 268. There is a presumption against the waiver of counsel, *People v Belanger*, 227 Mich App 637, 641; 576 NW2d 703 (1998), and courts have established strict criteria that must be met before a criminal defendant will be allowed to waive his or her right to counsel.

When a defendant makes an initial request for self-representation, a trial court must determine, under the standards established in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), that:

> (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*Russell*, 471 Mich at 190.]

The trial court must also satisfy the requirements of MCR 6.005(D), which states that the trial court may not permit the defendant's initial waiver of the right to counsel without:

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer. [MCR 6.005(D); *Russell*, 471 Mich at 190.]

The trial court should deny a defendant's request for self-representation where there is uncertainty as to whether the waiver requirements have been satisfied. See *id*. at 191.

The trial court did not err in denying defendant's request to represent himself at trial. During the pretrial conference, defendant communicated his request for self-representation:

> *Trial Court*: What's up, Mr. Fleming?
>
> *Defendant*: Your Honor, I'd like to represent myself.
>
> *Trial Court*: Oh. Bad idea, Mr. Fleming. Bad idea.
>
> *Defendant*: I'm qualified to—represents himself has a fool for a client.
>
> *Trial Court*: No. No. No. That's not it. You just told me that you jut [sic] got the [discovery] information.
>
> *Defendant*: Yes.
>
> *Trial Court*: It's a bad idea to try to be prepared to go to trial by yourself just getting the information over a weekend. I wouldn't let you do that. That's not advisable, sir. That doesn't even make sense. I would say help your lawyer, which I'm sure you have been doing along the way. You do not want to represent yourself, nor do I think anybody would be capable of preparing for this trial over a weekend. I wouldn't let a lawyer lawyer [sic] do it.
>
> *Defendant*: I understand.
>
> *Trial Court*: Okay.

As the foregoing colloquy shows, the trial court did not proceed systematically by considering the *Anderson* criteria. Nevertheless, the court did explain the "risk involved in self-representation," MCR 6.005(D)(1), given that the trial was scheduled to commence in four days, and defendant had just received his discovery package. In addition, the trial court's observation that no one would be able to prepare for "this trial" over a weekend might reasonably be presumed to refer to the severity of the charges against defendant, which included two counts of first-degree murder, and the sentences such charges carried. After the trial court's warning, defendant affirmed that he understood and apparently acquiesced to the trial court's recommendation since he did not contest the trial court's advice or renew his request to represent himself anytime thereafter. In

addition, the record shows that defendant was given the benefit of both self-representation and representation by his trial counsel: defendant cross-examined Detective Molnar and Green, conducted a direct examination of Detective Jason Mayes, and gave his own closing argument. In light of the court's initial advice to defendant, defendant's statement that he understood the court's position, and his apparent abandonment of the request for self-representation, we cannot say that defendant's initial request for self-representation was unequivocal. Accordingly, the trial court did not abuse its discretion by denying defendant's request for self-representation. See *Russell*, 471 Mich at 191.

B. INEFFECTIVE ASSISTANCE

Next, in a standard 4 brief,[2] defendant argues that trial counsel was ineffective for failing to timely provide him with discovery and to petition the trial court for DNA, ballistics, and fingerprint experts. We disagree.

"Whether a person has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009) (quotation marks and citation omitted). Defendant having failed to preserve this issue for appellate review by moving for a new trial or an evidentiary hearing to develop the record, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. See *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The decision whether to call or question witnesses is presumed to be a matter of trial strategy. *People v Russell*, 297 Mich App 707, 716, 76; 825 NW2d 623 (2012).

1. DISCOVERY PACKAGE

Defendant first asserts that trial counsel failed to provide him the discovery package until four days before trial, 13 months after counsel's assignment as defendant's trial counsel. Trial counsel's failure to share discovery materials with a defendant in a timely manner may be

[2] A "Standard 4" brief refers to the brief a defendant may file in propria persona pursuant to Standard 4 of Michigan Supreme Court Administrative Order No. 2004-6, 471 Mich c, cii (2004).

unreasonable if that failure negatively impacts trial counsel's ability to prepare for trial or to decide what strategy to pursue. *People v Jackson*, 292 Mich App 583, 601; 808 NW2d 541 (2011). However, to merit relief, defendant must "explain what he would have done differently, either before or at trial, if he had received any discovery materials sooner" and how trial counsel's failure caused prejudice by undermining the reliability of the verdict. *Id*.

Apart from asserting that trial counsel rendered constitutionally ineffective assistance by delivering his discovery package to him four days before trial, defendant fails to address this issue further in his standard 4 brief. He does not allege the failure to timely share discovery materials negatively impacted counsel's ability to prepare for trial or explain what he would done differently had he received the discovery materials sooner, *id*., nor does he identify how, but for counsel's alleged deficient performance, the result of the proceedings would have been different, *Trakhtenberg*, 493 Mich at 51. Even if we assumed that defendant established the performance prong of ineffective assistance of counsel, defendant's failure to show prejudice is fatal to his claim of ineffective assistance based on counsel's alleged failure to timely provide him with the discover package. *See id*.

2. EXPERT WITNESSES

Defendant next argues trial counsel failed to obtain expert witnesses in DNA, ballistics, and fingerprints. We disagree.

Defendant asserts he should have been found "not guilty by reason of insanity" because of the effects of alcohol and drugs at the time of the incident. Consequently, he contends that counsel should have obtained a DNA expert to test his blood for cocaine or any fentanyl mixture and to testify about the effects such drugs would have had on his mind and body. Defendant misapprehends the law.

"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." MCL 768.21a(1). Michigan law defines legal insanity as the substantial incapacity "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" as a consequence of mental illness or an intellectual disability as defined by MCL 330.1400 or MCL 330.1100b respectively. MCL 768.21a(1). However, "[a]n individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." MCL 768.21a(2). Defendant has not alleged of himself a mental illness or intellectual disability as defined by statute. Thus, to the extent defendant contends a DNA expert would have established that he was not legally responsible for the charged crimes solely because of temporary, drug-induced "insanity," defendant's argument is unavailing.

Equally unavailable to defendant is the defense of voluntary intoxication. Voluntary intoxication may be a defense to specific intent crimes where the defendant can establish "by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that

he or she would become intoxicated or impaired." MCL 768.37. Even if a DNA expert concluded that defendant's blood contained cocaine or other drugs at the time of the incident, defendant could not benefit from this defense because he could not meet the burden of proof to establish it. Defendant admitted to voluntarily ingesting cocaine and to having used cocaine since the 1980s. However, there is no indication, let alone a preponderance of the evidence, that defendant "legally obtained and properly used" the cocaine, and from his long history of cocaine use, one might properly infer that defendant was reasonably aware of cocaine's intoxicating effects. Given the unavailability of either an insanity defense or a voluntary intoxication defense under the circumstances presented, trial counsel's failure to obtain an expert witness to analyze and testify about potential cocaine in defendant's blood was not deficient. Accordingly, defendant's ineffective assistance claim based on counsel's failure to obtain a DNA expert fails. See *Trakhtenberg*, 493 Mich at 51.

Next, defendant argues that trial counsel rendered ineffective assistance by failing to obtain a ballistics expert to testify that defendant's gun did not fire the four shell casings found near the community room of the apartment building and the bullet found in the lobby desk. We disagree.

A defendant cannot establish ineffective assistance of counsel using speculation that an expert would have testified favorably. See *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defendant has not provided any factual support for his claim that a ballistics expert would have provided favorable testimony, nor has defendant provided a witness affidavit or identified a ballistics expert that would testify about his claim. Moreover, even if we assumed for the sake of argument that counsel's failure to obtain a ballistics expert to testify as defendant suggests, defendant has failed to show that, but for counsel's performance, the outcome of the trial would have been different. Sitting as the fact-finder in defendant's bench trial, the trial court expressed serious doubt that the shell casings in the community room conclusively established that defendant shot at McKay, Green, and Williams as they ran out of the apartment building. Instead, the trial court based its convictions on defendant's admission that he shot Hall and Clark and attempted to shoot Williams. Thus, even if trial counsel had obtained a ballistics expert to testify as defendant suggests, defendant has not shown that such testimony would have affected the outcome of the proceedings. Accordingly, defendant has not established ineffective assistance on the basis of counsel's failure to obtain a ballistics expert.

Lastly, defendant argues that his trial counsel rendered ineffective assistance by failing to obtain a fingerprint expert to testify that the absence of defendant's fingerprints on the apartment building's doors, defendant's knife, and the recovered shell casings meant that defendant's blood on those items was planted by Detroit police officers. Expert testimony regarding the absence of defendant's fingerprints at the scene might have aided the defense. However, it is mere speculation that an expert would have exceeded his or her area of expertise by linking the absence of defendant's fingerprints to some alleged malfeasance of the Detroit Police Department, and mere speculation that an expert would have testified favorably does not establish ineffective assistance of counsel. See *Payne*, 285 Mich App at 190. Further, even if we assume for the sake of argument that counsel rendered ineffective assistance by failing to obtain a fingerprint expert, defendant has failed to show prejudice. The record shows that the trial court was less convinced by evidence of defendant's blood throughout the scene, than by defendant's own admission that he shot Hall and Clark and attempted to shoot Williams. Because defendant has failed to establish both prongs of

the test for ineffective assistance of counsel, defendant's claim must fail. See *Trakhtenberg*, 493 Mich at 51.[3]

Affirmed.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Michael J. Riordan

[3] We acknowledge defendant's argument that appellate counsel rendered ineffective assistance by failing to raise additional issues on appeal, which included investigating corruption within the Detroit Police Department. Because defendant failed to properly present this aspect of his argument by including it in his statement of questions presented, he has waived the issue for appellate review. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011). Further, defendant failed to establish any support during trial or on appeal for his argument. "[A]ppellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review." *People v Reed*, 198 Mich App 639, 646-647; 499 NW2d 441 (1993).