S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 11, 2014
v JOHN ANDREW BEEMER, Defendant-Appellant.	No. 313602 Saginaw Circuit Court LC No. 11-036498-FH

ON RECONSIDERATION

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Following a bench trial, defendant appeals by right his conviction of operating a motor vehicle while intoxicated (OWI) causing serious impairment of a body function, MCL 257.625(5). We affirm.

Defendant's conviction arose from his failure to yield at a stop sign and his subsequent collision with a car driven by Russell Ray. Emergency personnel took Ray and the occupants of his car to the hospital, where doctors determined that Ray had a fracture in his wrist. At trial, defendant testified that on the day of the collision he had been drinking beer, and that he was drinking a beer in his car when the collision occurred.

On appeal, defendant first argues that his jury trial waiver was invalid. We review the validity of the jury trial waiver for clear error. *People v Taylor*, 245 Mich App 293, 305 n 2; 628 NW2d 55 (2001). A valid waiver requires "evidence on the record that defendant was fully informed about his right to a jury trial and voluntarily waived that right." *People v Cook*, 285 Mich App 420, 424; 776 NW2d 164 (2009). MCR 6.402 delineates the procedure for a jury waiver. The rule instructs trial courts to advise defendants of the constitutional right to a jury trial. MCR 6.402(B). In addition, the rule instructs trial courts to "ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court." *Id*. A trial court's compliance with MCR 6.402 creates a presumption that a jury trial waiver is valid. See *People v Mosly*, 259 Mich App 90, 96-97; 672 NW2d 897 (2003).

Although compliance with MCR 6.402 ensures that a waiver is valid, a lack of compliance with the rule does not necessarily render the waiver invalid. *Mosly*, 259 Mich App at

96. "[I]f the record establishes that defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right," then reversal is not required. *Id.*

In this case the record reflects a discussion of the waiver, as follows:

> *Defense attorney*: One other thing that I can—we should do. Although we entered into some written agreements and stipulations, this matter is being tried before the bench and we have waived our right to a jury trial. I've explained to my client that he has a right to be tried in front of a jury and that only he can waive that right but it has to be done with the agreement of the Court and the prosecution.
>
> In this case the prosecutor and I have agreed to try this in front of the bench, and I'm assuming from the posture that we are in here that the Court has agreed to hear it as a bench trial.
>
> But I would just ask [defendant] to acknowledge on the record that we have discussed that and it is our decision to go forward with the bench trial and to waive our right to a jury in this matter.
>
> *Defendant*: Yes, sir.
>
> *Court*: All right. And it's agreeable?
>
> *Prosecutor*: The People do agree to a bench trial. Thank you.

After his conviction, defendant moved for a new trial. In the motion, defendant argued that it was not his decision to waive his right to a jury trial and that he in fact had wanted a jury trial. At the hearing on defendant's motion, the trial judge indicated that he thought defendant had made a valid waiver of the jury trial right prior to the first day of trial. The judge acknowledged that at trial he had not made the specific record of defendant's waiver delineated in MCR 6.402. The judge nonetheless concluded that defendant had validly waived his jury trial right.

We find no clear error in the trial court's conclusion regarding the waiver. Defendant's attorney stated that he had discussed the matter with defendant, and that defendant had agreed to proceed with a bench trial. Defendant acknowledged that the discussion occurred and that he was agreeing to a bench trial. Defendant maintains that counsel's use of "we" and "our" during the waiver discussion indicated that counsel waived the right and not defendant. However, in context, counsel was indicating that he was acting on behalf of defendant, i.e., presenting defendant's decision to the court. The record therefore demonstrates that defendant knowingly, voluntarily, and intelligently waived his jury trial right. Accordingly, the record supports the trial court's decision to deny defendant's motion for a new trial. See generally *Mosly*, 259 Mich App at 96.

Next, defendant argues that there was insufficient evidence to establish that Ray suffered a serious impairment of a body function, and therefore there was insufficient evidence to support his conviction. We review a challenge to the sufficiency of the evidence de novo. *People v*

Ericksen, 288 Mich App 192, 195; 793 NW2d 120 (2010). The evidence is examined in a light most favorable to the prosecution, and the determination is made whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id.* at 196. The prosecutor has the burden to produce evidence that demonstrates guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). Circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). During a bench trial, the judge as fact-finder must rely only on the evidence presented when determining guilt or innocence. *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991). The trial court may make reasonable inferences that arise from the evidence of record, whether the evidence is direct or circumstantial. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). The judge is "obligated to articulate the reasons for his decision in findings of fact." *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973).

To sustain a conviction under MCL 257.625(5), the prosecutor must prove beyond a reasonable doubt that defendant (1) operated a motor vehicle, (2) while intoxicated or impaired, and (3) caused serious impairment of a body function of another person because of the operation of the motor vehicle. MCL 257.625(1), (3), and (5). Defendant maintains that there was insufficient evidence to prove that the injury Ray suffered qualified as a serious impairment of a body function.

> The court found on the question as follows:
>
> And I've heard this witness say that he had the loss of the use of the hand, he could use it somewhat but not to the extent that he could use it before the injury. I think that if you're driving and you're intoxicated and you run your car into someone, I think this legislature intended that if you caused someone to have a broken bone and that broken bone causes them . . . seven to eight weeks, and even in this case beyond that because he's still having problems with that injury. And whether or not he took the cast off earlier than maybe he should have, the doctor had advised him to keep it on for seven to eight weeks, and to me that amounts to a serious impairment of the body function.

The Michigan Vehicle Code, MCL 257.1 *et seq.*, supplies a definition for "serious impairment of a body function." MCL 257.58c provides in relevant part:

> "Serious impairment of a body function" includes, but is not limited to, 1 or more of the following:
>
> (a) Loss of a limb or loss of use of a limb.
>
> (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
>
> * * *
>
> (d) Loss or substantial impairment of a bodily function.

* * *

(h) A skull fracture or other serious bone fracture.

The terms "loss", "substantial", "impairment", and serious are not statutorily defined. "'If a statute does not expressly define its terms, a court may consult dictionary definitions.'" *Mount Pleasant Pub Schs v Michigan AFSCME Council 25 et al*, 302 Mich App 600, 608; ___ NW2d ___ (2013), quoting *People v Gregg*, 206 Mich App 208, 211-212; 520 NW2d 690 (1994). The term "loss" is defined in part as "[t]he condition of being deprived . . . of something." *The American Heritage Dictionary of the English Language* (1996). To "impair" the operation of something means "[t]o cause to diminish, as in strength, value, or quality." *Id.* "Substantial" means "[c]onsiderable in importance, value, degree, amount, or extent." *Id.*

This Court addressed this statute in *People v Thomas*, 263 Mich App 70; 687 NW2d 598 (2004). In *Thomas*, the victim suffered a broken vertebrae bone in his neck and a sprained left knee. *Id.* at 72.

> The sprain to the left leg was described by the [victim's] treating physician as 'severe.' The [victim] was unable to walk without crutches for several weeks and missed approximately 2-1/2 months of work. However, the treating physician opined that the leg injury was completely healed at the time of defendant's trial . . . . [*Id.*]

Thomas began by noting that the definition of serious impairment of body function as used in the no-fault act, MCL 500.3101 *et seq.*, is not applicable to criminal cases. *Id.* at 75. The Court reasoned that because the criminal statute supplied its own glossary of definitions, those definitions were applicable. *Id.*

Thomas concluded that "[t]he specific injuries suffered by the [victim] here are not within the statutory listing and the question presented is whether they nonetheless constitute serious impairments of body functions within the meaning of the statute." *Thomas*, 263 Mich App at 76. It then noted, however, that the list provided in MCL 257.58c was not exhaustive and that an unlisted injury should be compared to listed injuries to determine the similarity. *Id.* at 76. Looking to the listed injuries, the Court concluded that the injury does not have to be permanent or long lasting to constitute a serious impairment of a body function. *Id.* The Court ultimately decided that the injury to the victim's leg would have been sufficient alone to qualify as a serious impairment of a body function. *Id.* at 77. The Court said:

> The statute here does not specify the length of time such a loss must be suffered. On the one hand, it does not require that the loss of use be long-lasting or permanent. On the other, it does not specify that any lost use, for no matter how short a time, is sufficient.
>
> In light of these considerations, we conclude that the trial court properly decided that the injury to the officer's left leg constituted a "serious impairment of a body function" under the statute. The officer lost the use of that limb almost completely for several weeks while he was on crutches and, to a more limited extent, during the several months that he was unable to return to work. This

impairment was certainly less extreme than what would have been the case had the officer been rendered comatose. But it was far more long-lasting than the three days that would have been sufficient had a comatose state resulted. We conclude that this lesser impairment, itself within the statutory list, suffered for a much greater time than required for a more serious injury within the list, is properly considered as falling within the "serious impairment" category. [*Id.*]

In light of *Thomas*, we conclude here that the trial court did not err in determining that the injury suffered was a serious impairment of a bodily function. There was sufficient evidence presented to establish beyond a reasonable doubt that Ray lost both the use of his hand, MCL 257.58c(b), and of a "bodily function," MCL 257.58c(d), as well as sustaining a "substantial impairment of a bodily function," MCL 257.58c(d). Ray's wife testified that after the accident, his wrist was swollen and he could not use it. She said that he could not grasp with his left hand. Ray testified that at the hospital he was told he had broken his left wrist and it was placed in a splint. He said that after his wrist and hand were splinted he could not use that hand. The treating physician at the hospital testified that Ray had a "mildly displaced dorsal triquetrial fracture" in his left wrist. She also said he was able to move his fingers, but experienced pain when he did so. Ray testified that at his follow-up appointment five days after the accident, his hand was put in a cast and was immobilized. Ray said that he was supposed to use the cast/splint for six to eight weeks. Although he apparently did not keep it on for that period of time, there was testimony that he used the splint for a total of at least three weeks. Ray testified to having problems using his hand and gripping items and still had those problems as of trial. He testified that he has still not recovered full strength, mobility, or dexterity.

Defendant also argues that the trial court erred in limiting the expert testimony of the physician who treated him at the hospital. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion, *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010), while preliminary questions of law impacting the evidentiary issue are reviewed de novo, *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). An abuse of discretion occurs when the decision falls beyond the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

MRE 702 governs the admissibility of expert witness testimony. According to MRE 702, expert testimony is admissible if "the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

The physician testified that the splint placed on Ray immobilized his wrist but allowed for limited movement of the fingers. During cross-examination the physician was asked to compare Ray's injury to the loss of an organ:

Q. Okay. Doctor, the severity of this injury, how would you compare it to, say, the loss of an organ?

A. I guess it . . . I'm not sure what the definition of a severity is, as far as that.

Q. Scale of 1 to 5?

A. We use severity in a different way in the way somebody presents. So this person would have been categorized in a triage category, the way we would do it, as less severe because loss of an organ would have required some operative procedure or something like that. So this would have been less than that, compare to an organ.

Q. Okay. How about a subdural—

A. In terms of long-lasting event, that would be something different.

The physician then discussed how people with wrist injuries can have long-lasting pain. Defense counsel then asked how Ray's injury would "compare in seriousness of impairment to a subdural hemorrhage." The prosecutor objected to the line of questioning, stating that the trier of fact was responsible for determining whether Ray's injury was a serious impairment. The trial court sustained the objection saying, "I don't see how she can evaluate a comparison between what happened here and some other injuries." During the hearing on motion for new trial, the trial court said the testimony was not "of any value to me as a fact-finder to hear the expert say, well, I think that X that's listed is more serious than what he's saying he incurred."

What defense counsel was asking the physician to do, essentially, was offer an opinion on whether Ray had sustained a "serious impairment of a body function." Defendant is correct in indicating that an expert's testimony "will not be excluded simply because it embraces an ultimate issue to be decided by the trier of fact." *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). However, the testimony must still be helpful to the trier of fact and offered by a qualified witness to be admissible. MRE 702. The physician was qualified as an expert "regarding the emergency medicine diagnosis and the related matters," but not regarding comparing one injury to another on a legal sliding scale. Indeed, the physician told defense counsel that she did not know how counsel was using the term "severity," and that in terms of medical triage, "severity" had a different meaning. Therefore, she did not have the expertise to offer an expert opinion on the "severity" of Ray's injuries in relation to listed examples of serious impairment. The trial court did not err in limiting the testimony.

Defendant also cites confrontation rights case law. The Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20, guarantees a defendant the right to confront witnesses against him. *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). However, the right to confront witnesses is generally satisfied by the ability to cross-examine. *People v Hill*, 282 Mich App 538, 540; 766 NW2d 17, aff'd in part, vacated in part on other grounds 485 Mich 912 (2009). Although a defendant has a right to confront witnesses against him, it is not an unlimited right. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). "Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony." *Id.* at 190 (emphasis by *Ho* Court). "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998).

Here the trial court's limitation on the testimony was not a violation of the Confrontation Clause because defendant was able to reasonably cross-examine the physician. See *Ho*, 231 Mich App at 189. The trial court did not prevent defendant from exploring facts that may have established bias, prejudice, or lack of credibility. *Kelly*, 231 Mich App at 644. It only limited her ability to offer an opinion on how Ray's injury compared to injuries specifically listed in MCL 257.58c. See MCL 257.58c(*i*) and (j). Therefore, there was no violation of defendant's right to confront. *Id.*

Defendant also argues that his trial counsel was ineffective for failing to call an expert witness to testify that Ray's injury was not a serious impairment. We disagree. An ineffective assistance of counsel claim has a mixed standard of review. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). "This Court reviews the trial court's factual findings for clear error and reviews de novo questions of constitutional law." *Id.*

Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1 § 20. Generally, effective assistance is presumed, and the defendant carries the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below objective professional norms, and that but for counsel's ineffectiveness, the ultimate result would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *Strickland*, 466 US at 687; *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel has wide discretion in trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Decisions regarding defense strategy and the arguments that will be presented at trial are matters of trial strategy. *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011). Failure to call a particular witness, or present certain evidence, will constitute ineffective assistance of counsel only when the failure would deprive the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that may have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). This Court will not substitute its judgment for that of counsel when it comes to matters of trial strategy. *Payne*, 285 Mich App at 190.

Defendant maintains that trial counsel was ineffective for failing to call a hand surgeon to testify that Ray's injury did not meet the serious impairment threshold. Defendant raised this issue with the trial court during his motion for a new trial. The trial court responded as follows:

> And that also goes to . . . whether or not there was inadequate representation. It would have been no benefit to the defendant for him to bring in some other expert to tell me that in that expert's opinion, this doesn't amount to a serious injury. I had to make that decision from the testimony that I heard from the witnesses, and I did. . . .

On appeal, defendant offers an affidavit from Sampson P. Samuel, M.D. Samuel said that after reviewing the testimony and records, he did not find Ray's injury to be a serious impairment.

Defendant has failed to demonstrate that trial counsel's decision was objectively unreasonable. Medical testimony on what Ray could and could not do following the accident was relevant to the inquiry, but it was up to the fact-finder to determine if that evidence revealed an injury that satisfied the statutory threshold. In fact, the court clearly stated that the decision was in its hands. Defendant has not demonstrated that counsel's performance fell below professional norms. *Strickland*, 466 US at 687; *Frazier*, 478 Mich at 243.

Defendant argues that the trial court's evidentiary rulings in regard to the physician who treated him at the hospital were clouded by the trial court's dual role as judge and fact-finder and therefore violated defendant's right to due process. This issue is unpreserved, so it will be reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764. We find no plain error.

MRE 611(a) indicates that the trial court has discretionary control over "the mode and order of interrogating witnesses and presenting evidence." The trial court is given this power to "(1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a).

Defendant maintains that the limitation on the testimony violated his right to confront witnesses against him. However, defendant was able to cross-examine the physician. What he was not allowed to do was pursue a line of questioning that was properly curtailed.

Defendant also asserts that his right to present a defense was violated. When presenting a defense, a defendant has a constitutional right to present witnesses. *Washington v Texas*, 388 US 14, 17-18; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). The right to present witnesses and compel their attendance is generally what constitutes the right to present a defense. *Hayes*, 421 Mich 278.

Defendant was able to pursue his defense that Ray did not sustain a serious impairment of a body function through cross-examination of the witnesses. Counsel got Ray to testify that he was right-handed (the injury was to his left wrist), that his wrist was only wrapped with a bandage by the hospital, and that he only took one day off from work. On cross-examination, the hospital's treating physician testified that Ray's fingers at the hospital worked, that there was possible evidence of an old fracture in the wrist, and that the injury was less severe than the loss of an organ. Moreover, as discussed above, the trial court indicated that a defense expert witness would not have made a difference. Defendant has not established he was denied the right to present a defense. *Washington*, 388 US at 17-18; *Hayes*, 421 Mich at 278.

Lastly, defendant asserts that the limitation of the physician's testimony and non-presentation of an expert witness, deprived him of the right to a meaningful appeal. First, the physician's opinions on the seriousness of the injury, as compared to specific injures set forth in MCL 257.58c, were properly limited. The issue of the validity of the court's ruling has been

fully considered on appeal. Second, defendant provided to the Court the affidavit of Dr. Samuel on the necessity of calling a defense expert witness, thus effectively preserving the issue for consideration. Defendant has failed to demonstrate any plain error affecting substantial rights. *Carines*, 460 Mich at 764.

Finally, defendant argues that the trial judge should not have presided because he was authorized to only hear "non-disqualification" matters. We disagree. Under the record available to us, defendant did not object to the assignment and has therefore forfeited the issue. Forfeiture does not extinguish any error, and we analyze the issue under the plain error analysis in *Carines*, 460 Mich at 750. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

There was no plain error because defendant has not established that the assignment of his case to Judge Caprathe was inconsistent with the January 1, 2012, assignment order from the State Court Administrative Office (SCAO). The SCAO assignment authorized Judge Caprathe to serve as a Judge of the Saginaw Circuit Court "as directed by the chief judge" except in disqualification matters. On January 27, 2012, Chief Judge Kaczmarek assigned this case to himself after four other Saginaw Circuit Judges disqualified themselves. Defendant has presented nothing to this Court to establish that Chief Judge Kaczmarek subsequently disqualified himself from the case. Absent an order of disqualification of Chief Judge Kaczmarek, the record indicates that Chief Judge Kaczmarek assigned this case to Judge Caprathe to assist in the docket, in keeping with the SCAO assignment order.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell