STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 31, 2014
v	No. 313601 Calhoun Circuit Court
HOWARD LOUIS MCDONALD, JR., Defendant-Appellant.	LC No. 2012-000638-FC

Before: RONAYNE KRAUSE, P.J., and KURTIS and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316; first-degree home invasion, MCL 750.110a; and assault with a dangerous weapon (felonious assault), MCL 750.82. We affirm.

I. BACKGROUND

Defendant and his wife, Sheila, became estranged after approximately one year of marriage due to defendant's use of crack cocaine. Their marriage produced one child named "J" who was an addition to Sheila's two children from a previous relationship. Sheila and her children left the family home on Cliff Street and moved in with her parents, Robert and Joan. Defendant made threatening phone calls to Sheila and her parents. On one occasion defendant refused to allow J to return home with Sheila which resulted in the police being called. Sheila obtained a personal protection order against defendant and left the marital home with her children. Defendant was not permitted to spend time with J and this angered him. Defendant told Shelia that "no one will survive this marriage," "no one will take care of" J other than him, that "he got screwed in the divorce" and "there's going to [be] blood all over the walls of the house." Sheila decided to change the locks and repair the front door of the Cliff Street home before she and the children returned to the house. Sheila's parents were assisting her with the repairs that needed to be done.

The incident which gave rise to defendant's convictions occurred on the evening of November 8, 2012. Sheila's parents had come to the Cliff Street home to do some repairs. Joan went inside and Robert stayed on the porch to accept a call from Sheila. As they talked, defendant emerged from the house and put his arm around Robert's neck and said, "that's what you guys get for not letting me see" J. A struggle ensued between defendant and Robert while defendant screamed and swung a baseball bat. Robert was able to distance himself from

defendant, but when defendant ran back into the house, Robert ran in after him because he knew Joan was in there. Robert and defendant fought in the foyer, Robert gained control over the bat and defendant said "that's it," and walked out of the front door of the house. Robert then went to look for Joan and found her lying on the floor in a room near the front of the house. Her eye was swollen shut, she had bruising on her hand, blood was flowing from her head, and she was non-responsive. Robert called "911." As Robert was on the telephone with the emergency dispatcher, defendant came back into the house, picked up the baseball bat again, and sat down in a chair. Defendant then exited the home, waived police over and lay down on the front lawn.

Defendant voluntarily spoke with police, but could not account for exactly what he did to Joan. Defendant however, admitted that he knew he hurt Joan because there was nobody else in the house. Joan died while in the hospital. Her cause of death was determined to be blunt force trauma to her head. The baseball bat that Robert saw defendant holding was collected as evidence from the Cliff Street home. At trial DNA evidence was introduced from the "grip" end of the bat matching defendant's and from the "barrel" end of the bat matching Joan's. Defendant presented an expert witness in the field of psychology, Dr. Haugen, who testified on the issue of dissociative amnesia. Dr. Haugen testified that dissociative amnesia can cause a person to forget selective details or everything during a specific time period. After the jury was given their final instructions defendant asserted his right to testify in his own defense and supposed he fire his lawyer and represent himself. The trial court informed defendant, "It's too late for that, Mr. McDonald."

The jury returned a verdict of guilty on all three counts, first-degree murder, first-degree home invasion, and felonious assault. Defendant was later sentenced as a third-offense habitual offender, MCL 769.11, to life imprisonment without the possibility of parole for the first-degree murder conviction, 20 to 40 years' incarceration for the first-degree home invasion conviction, and 43 to 96 months' incarceration for the felonious assault conviction.

II. RIGHT TO TESTIFY

On appeal, defendant first claims that he was denied his constitutional right to testify in his own defense. However, the record supports a finding that defendant knowingly and voluntarily waived his right to testify in his defense. *People v Moore*, 164 Mich App 378, 384; 417 NW2d 508 (1987). He consulted with his trial counsel regarding the decision to testify and acquiesced in his trial counsel's decision that he should not testify. It was not until after the jury was given final instructions that the defendant approached the trial judge and engaged in a dialogue regarding his ability to testify. In that colloquy he did not ask that proofs be re-opened. A defendant who waives a right may not then seek appellate review of a claimed deprivation of that right, because his waiver extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues that the trial judge misinformed him as to his legal right to testify during the post jury instruction dialog and through that misinformation deprived him of the right to give testimony. The record does not support a finding that the trial court interfered in any way with defendant's right to testify. The defendant was clearly aware of his right to testify and that he had at least one, and possibly several, conversations with his counsel about testifying. Defendant was not coerced or intimidated by the trial court into waiving his right to testify, and

the trial court did not improperly interfere with defendant's constitutional right to testify. *People v Hunter*, 46 Mich App 158, 160-161; 207 NW2d 417 (1973).

III. INEFFECTIVE COUNSEL

Defendant also argues that his trial counsel was ineffective for failing to assert an insanity defense on his behalf. We previously remanded this case to the trial court to permit defendant to file a motion for a new trial limited to this issue and for a *Ginther*[1] hearing on this issue. *People v McDonald*, unpublished order of the Court of Appeals, entered October 30, 2013 (Docket No. 313601). Whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law," and "[t]his Court reviews findings of fact [if any] for clear error and questions of law de novo." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citation omitted). This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012).

An insanity defense based on mental illness requires a defendant to prove by a preponderance of the evidence the following: (1) that he is mentally ill, as defined in MCL 330.1400; and (2) that because of his mental illness, he lacks substantial capacity either to appreciate the nature and quality of the wrongfulness of his conduct or to conform his conduct to the requirements of the law. *People v Jackson*, 245 Mich App 17, 23-24; 627 NW2d 11 (2001). See also MCL 768.21a. The failure to pursue or present an insanity defense can constitute ineffective assistance of counsel. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). However, "[e]ffective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation omitted). To demonstrate ineffective assistance of trial counsel, a defendant has the burden of proving that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Heft*, 299 Mich App at 80-81. To establish that he was prejudiced, a defendant must show that "but for defense counsel's errors, the result of the proceeding would have been different." *Id*. at 81.

Defendant's trial counsel adequately investigated an insanity defense. Trial counsel filed a notice of his intention to assert the insanity defense prior to bind-over; ensured that defendant was evaluated by the Center for Forensic Psychiatry; sought and obtained funds to have defendant evaluated by an independent expert, Dr. Randall Haugen; provided Dr. Haugen with defendant's relevant records and relevant Michigan law; and met with Dr. Haugen several times to discuss this case. The trial court did not clearly err when it found that trial counsel's investigation of the insanity defense did not constitute ineffective assistance of trial counsel. *People v Lloyd*, 459 Mich 433, 450; 590 NW2d 738 (1999).

The trial court also did not err in finding that trial counsel's decision not to call Dr. Haugen to testify regarding an insanity defense constituted reasonable trial strategy. At the *Ginther* hearing, defendant's trial counsel testified that he specifically addressed the issue of defendant's criminal responsibility with Dr. Haugen, and that Dr. Haugen agreed with the

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

conclusion of the examiner from the Center for Forensic Psychiatry, specifically that defendant was criminally responsible for his actions. The trial court found this testimony by defendant's trial counsel to be credible, and a reviewing court must defer to credibility decisions made by a trial court during a *Ginther* hearing. *People v Grant*, 470 Mich 477, 485 n 5; 684 NW2d 686 (2004). In sum, the trial court did not commit clear error when it found that defendant's trial counsel and Dr. Haugen specifically discussed defendant's criminal responsibility, and that Dr. Haugen told trial counsel that he believed defendant was criminally responsible for his actions. Further, after trial counsel was apprised of this opinion from his expert, it was reasonable for trial counsel to believe that there was no basis for an insanity defense and thus it was reasonable trial strategy for trial counsel to attempt to mitigate the charge from first-degree murder to a lesser offense using Dr. Haugen's testimony of defendant's disassociation at the time of the crime. This Court "will not reverse where failure to raise an insanity defense is a question of trial strategy." *Newton (After Remand)*, 179 Mich App at 493. The trial court did not abuse its discretion when it found that trial counsel's performance was based upon strategic decisions that were reasonable in light of professional norms. *Lloyd*, 459 Mich at 438, 440.

Because we find that the trial court did not err when it concluded that trial counsel's performance did not fall below an objective standard of reasonableness, we need not address whether there is a reasonable probability that the outcome of the trial would have been different had Dr. Haugen testified that defendant met the legal definition for insanity at the time he committed the offenses of which he was convicted. Further, we decline to address the prosecution's argument that Dr. Haugen's diagnosis of a personality disorder was insufficient to constitute a mental illness pursuant to MCL 330.1400 for purposes of an insanity defense.

We affirm.

/s/ Amy Ronayne Krause
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens