STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 5, 2010
v	No. 286412 Calhoun Circuit Court
MICHAEL DEVON FISHER, Defendant-Appellant.	LC No. 2007-002805-FC

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316(a); two counts of possession of a firearm during the commission of a felony, MCL 750.227b(a); and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to life imprisonment without parole for each of the first-degree murder convictions, 2 years' imprisonment for each of the felony-firearm convictions, and 23 to 60 months' imprisonment for his carrying a concealed weapon conviction. Defendant appeals as of right. We affirm.

On December 28, 2006, defendant shot and killed his wife, Candy Fisher, and his 12-year-old son, Michael Fisher, Jr. at their home. At trial, defendant asserted an insanity defense.

First, defendant argues that MRE 404(b) barred testimony from defendant's former wife, Annette Daley, and defendant's stepdaughter, Nicole Burgdorf, because their testimony was irrelevant and the prejudicial effect substantially outweighed the probative value of the testimony. At trial, Daley testified that defendant physically assaulted her during their relationship and threatened to kill her on multiple occasions. According to Daley, when defendant threatened to kill her, he told her that he would avoid criminal responsibility for the murder by pleading insanity. Additionally, Burgdorf testified that defendant talked of robbing banks and he stated that he would plead insanity to avoid any criminal responsibility for committing any crimes.

Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). The decision to admit evidence "frequently involves a preliminary question of law, such as whether a rule of

evidence or statute precludes the admission of the evidence. We review questions of law de novo. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Pursuant to MRE 404(b), evidence of other acts committed by a defendant is inadmissible "if the proponent's only theory of relevance is that the other acts shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question." *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Evidence is admissible under MRE 404(b) if the evidence is offered for a proper purpose, the evidence is relevant, and the probative value of the evidence substantially outweighs the potential of unfair prejudice. *Id*. at 74-75.

This Court must initially consider whether this evidence was admitted for a proper purpose. The plain language of MRE 404(b)(1) considers premeditation, intent and plan to be proper purposes. The prosecution submitted the evidence to demonstrate defendant premeditated the murders and planned and intended to kill the victims. Based on the plain language of MRE 404(b)(1), the evidence was offered for a proper purpose. MRE 404(b)(1).

If the evidence was admitted for proper purpose, then this Court must determine if the evidence was relevant. *VanderVliet*, *supra* at 74-75. MRE 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

A material fact is defined as one that is "in issue" in that "it is within the range of litigated matters in controversy." *Id*. Because defendant's state of mind was in issue and was material to the case, the fact that defendant on several previous occasions threatened to kill Daley and stated to both Daley and Burgdorf that he would avoid criminal responsibility for any criminal act by pleading insanity was logically relevant to whether defendant was truly insane at the time of the murders and made it more probable than not that he was not insane. Consequently, the evidence was relevant. See *People v Cramer*, 97 Mich App 148, 159-161; 293 NW2d 744 (1980) (Because the defendant pleaded an insanity defense, his state of mind was in issue and the prosecution was permitted to present relevant evidence to establish defendant's state of mind on the day of the murder).

This Court must next determine whether the evidence was more probative than prejudicial. *VanderVliet*, *supra* at 74-75. MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Here, defendant's threats to Daley and defendant's statements to both Daley and Burgdorf about pleading insanity to avoid criminal responsibility were clearly probative of defendant's state of mind at the time of the murders. Though this evidence of defendant's state of mind was probative, the evidence that defendant physically abused Daley, attempted to set her afire, and that he considered robbing a bank was also prejudicial. However, defendant fails to establish that he was unfairly prejudiced by this evidence as required by MRE 403. See *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994) ("The inquiry pursuant to MRE 403, however, is whether the disputed evidence was unfairly prejudicial. After all, presumably all the evidence presented by the prosecutor was prejudicial because it attempted to prove that defendant committed the crime charged.")

For the foregoing reasons, the trial court did not abuse its discretion when it admitted the challenged testimony.

Second, defendant contends that statements he made to a word processing assistant and a security guard at the Kalamazoo Regional Psychiatric Hospital (KRPH) while he sought admission to the hospital were protected by psychologist-patient privilege. Thus, the trial court should have suppressed the evidence. "This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence." *People v Akins*, 259 Mich App 545, 563-564; 675 NW2d 863 (2003). Though this Court reviews the entire record de novo, a trial court's factual findings are reviewed for clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). "The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

MCL 333.18237 provides, in pertinent part:

> A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services.

"The purpose of the privilege statute is to protect the confidential nature of the psychologist-patient relationship." *People v Lobaito*, 133 Mich App 547, 562; 351 NW2d 233 (1984). In addition, the admissibility of privileged communications is governed by MCL 330.1750, which prohibits the disclosure of "privileged communications" in a criminal case unless the patient has waived the privilege or an exception applies. MCL 333.1750(1). The Mental Health Code defines "privileged communications" as "a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to

another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law." MCL 330.1700(h). Statutory provisions are narrowly defined. *People v Childs*, 243 Mich App 360, 364-365; 622 NW2d 90 (2000). Privileges therefore are not easily found or endorsed by the courts. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994).

In this case, the psychologist-patient privilege does not apply to defendant's statements that he made to the word processing assistant and the security guard. As noted in *Lobaito*, *supra* at 562, the purpose of the privilege is to protect the relationship between the psychologist and the patient. Defendant has failed to establish any such relationship existed. Defendant was never admitted to the hospital and never consulted with a psychologist at KRPH. Defendant relies on *People v Mineau*, 194 Mich App 244; 486 NW2d 72 (1992), and *People v Farrow*, 183 Mich App 436; 455 NW2d 325 (1990), to support his claim that his communication to Keiser and Garza was privileged. Defendant's reliance on these cases is misplaced because in both cases the defendants consulted with mental health counselors for the purposes of treatment. *Mineau*, *supra* at 245; *Farrow*, *supra* at 441. It is undisputed that defendant never consulted with a mental health professional while at KRPH. The statutory privilege requires that the individual consult a psychologist in his/her professional capacity, which did not occur here. See MCL 333.18237.

Defendant also failed to establish that the challenged statements made to Keiser or Garza or both were "necessary to enable the psychologist to render services." MCL 333.18237. Further, defendant fails to demonstrate that his communication with Keiser and Garza was "privileged" as defined by MCL 330.1700(h). The challenged statements were not "to another person while the other person is participating in the examination, diagnosis, or treatment . . ." MCL 330.1700(h). There was no evidence in the record to support that defendant was ever examined, diagnosed, or treated at KRPH. Because statutory privileges are narrowly defined, the privilege did not exist on the facts of this case. See *Childs*, *supra* at 364-365.

Third, defendant argues that the trial court should have suppressed his statements to a police detective because the statements were elicited during a custodial interrogation before defendant's *Miranda*[1] rights had been explained to him. Specifically, defendant challenges the admission of defendant's comment that no one was home in response to the detective's inquiry into defendant's telephone number and of defendant's request that the detective shoot him in the head.

Both the Fifth Amendment of the United States Constitution and the Michigan Constitution prohibit the government from compelling a defendant to testify against himself. US Const, Am V; Mich Const, art 1, § 17. To admit a statement into evidence obtained from a defendant during a custodial interrogation, the defendant must have voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Akins*, *supra* at 564. "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode Island v Innis*, 446 US 291, 301-302; 100 S Ct 1682; 64 L Ed 2d 297 (1980) (emphasis in original).

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Here, defendant made the challenged statements when the detective asked him standard identification questions, such as defendant's name, address, telephone number, and date of birth. Because these were basic identifying questions, these questions were not likely to elicit any incriminating response. Contrary to defendant's assertions, the fact that the detective knew of defendant's visit to the hospital the night of the murders did not make the preliminary questions any more likely to elicit an incriminating answer. In fact, the detective testified that defendant was calm, was able to respond appropriately to the questions, was not crying, understood where he was at, and was coherent. Thus, there was no reason for the detective to have known that it was "reasonably likely" that requesting defendant's telephone number and other basic identifying questions would elicit an incriminating response. See *Innis, supra* at 301-302.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

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BECKERING, J. (*concurring*).

I concur in the outcome of my colleagues in affirming defendant's conviction. I write separately to express my disagreement with the majority's conclusion regarding the admissibility of defendant's statements to Michelle Keiser and Joel Garza, two employees of Kalamazoo Psychiatric Hospital (KPH).

On December 28, 2006, defendant shot and killed his wife and 12-year-old son in the living room of their home. Afterward, he drove himself to KPH and sought to be admitted. Keiser handled admissions and discharges at the hospital. In addition to obtaining general personal information from prospective patients, Keiser was responsible for inquiring *why* the person wished to be admitted. Keiser met with defendant to ascertain his reason for presenting to KPH. Due to potential safety concerns associated with walk-in patients arriving at KPH in distressed mental states, safety officer Garza was required to be present during the intake meeting with defendant. Keiser and Garza testified that throughout his approximate one-hour stay at KPH, defendant was extremely distraught and crying so forcefully that he had difficulty communicating. When Keiser attempted to determine why defendant sought admission, defendant stated that he wanted to go to sleep and not wake up, that he needed rest, and that he had done something that was unforgivable and beyond redemption.[1] Defendant stated, "Even God can't help me now." Calhoun Community Mental Health did not accept defendant's private insurance, so his request for admission to KPH was denied, and he was advised to go to Borgess Hospital for treatment.[2] Keiser feared defendant would harm himself if left alone, so she helped

[1] Garza testified that defendant asked if the hospital had a medication that could put him to sleep forever, so that he would never wake up.

[2] Keiser testified that in order to approve admissions, she is required to contact the screening
(continued…)

coordinate his transfer by ambulance to Borgess Hospital and ensured that a bed was available for him upon arrival. Garza assisted in comforting defendant and putting him on a gurney for medical transport.

At trial, the prosecutor elicited from Keiser and Garza the statements defendant made during the course of his attempt to be admitted to KPH. Contrary to the opinion of my colleagues, I would hold that defendant's statements to Keiser and Garza at the time of his request for admission fall within the scope of privileged communications under MCL 330.1700(h), and that no statutory exception to the privilege applies under the circumstances of this case.

Except under certain statutory exceptions, MCL 330.1750(1) explicitly protects privileged communications against disclosure in criminal proceedings and other matters:

> Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.

MCL 330.1700(h) of the Mental Health Code, MCL 330.1001 *et seq*., defines the scope of privileged communications with respect to psychiatric and psychological care as follows:

> "Privileged communication" means a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, **or to another person while the other person is participating in the examination, diagnosis, or treatment** or a communication made privileged under other applicable state or federal law (emphasis added).

While the majority focuses on the non-medical job titles of Keiser and Garza, MCL 330.1700(h) focuses instead on the nature and purpose of the communication. Communications are considered privileged when made to another "person"–without limitation to medically trained or licensed persons—while that person is participating in the examination, diagnosis or treatment of a patient. As such, Keiser's and Garza's job titles are irrelevant. Rather, the pertinent question is whether Keiser (and constructively Garza, who was required by the hospital to be present for security purposes) was participating in the examination, diagnosis or treatment of defendant.

It is undisputed that defendant was seeking admission and treatment at KPH, and that he could not obtain such treatment until he first met with Keiser. Keiser was required to inquire into and ascertain defendant's reason for seeking psychiatric care. She was the liaison between defendant and the off-site licensed psychologist in determining whether defendant could be admitted to KPH.[3] Keiser testified that she routinely documents her observations and

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licensed psychologist at the community mental health agency of the county in which the prospective patient resides.

[3] Keiser's role at KPH is analogous to that of an admissions clerk in an emergency room, to (continued…)

information obtained from prospective patients, and if the person is granted admission to KPH, her notes become part of the patient's medical chart. The only reason Keiser did not admit defendant to KPH was because he did not have the proper form of insurance coverage. Given her concerns that defendant required medical care and was not safe to be left alone, Keiser coordinated his transfer by ambulance to Borgess Hospital. Under these circumstances, I would conclude that Keiser was participating in the examination, diagnosis, and treatment process and that the statements defendant made to her, in the presence of Garza whose attendance was mandatory, fell within the scope of privileged communications under MCL 330.1700(h).

While defendant could have waived the privilege and permitted admission of his statements to Keiser and Garza in furtherance of his claim of insanity under MCL 330.1750(1), he chose not to do so. As such, the next pertinent question is whether any of the statutory exceptions apply that would enable defendant's statements to be disclosed in his criminal trial. MCL 330.1750(2) sets forth the following exceptions to the privilege:

> Privileged communications shall be disclosed upon request under 1 or more of the following circumstances:
>
> (a) If the privileged communication is relevant to a physical or mental condition of the patient that the patient has introduced as an element of the patient's claim or defense in a civil or administrative case or proceeding or that, after the death of the patient, has been introduced as an element of the patient's claim or defense by a party to a civil or administrative case or proceeding.
>
> (b) If the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communications could be used in the proceeding.
>
> (c) If the privileged communication is relevant to a matter under consideration in a proceeding to determine the legal competence of the patient or the patient's need for a guardian but only if the patient was informed that any communications made could be used in such a proceeding.
>
> (d) In a civil action by or on behalf of the patient or a criminal action arising from the treatment of the patient against the mental health professional for malpractice.
>
> (e) If the privileged communication was made during an examination ordered by a court, prior to which the patient was informed that a communication made would

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whom we must confide our reason for presentation before being seen by a triage nurse or a doctor. It cannot reasonably be argued that we may have no expectation of privacy through the physician-patient privilege when divulging our personal medical concerns to the person serving as the gatekeeper to such care. See, e.g., *People v Bland*, 52 Mich App 649, 653; 218 NW2d 56 (1974) (physician-patient privilege applied to the defendant's letters to a jail official requesting medical treatment), and McCormick, Evidence (6th ed), § 101 ("the preferable view is that of the courts that have based their decisions upon whether the communication was functionally related to diagnosis and treatment.")

not be privileged, but only with respect to the particular purpose for which the examination was ordered.

(f) If the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial.

The only statutory exception that comes close to the circumstances presented here is MCL 330.1750(2)(a), given that defendant's communications to Keiser were relevant to his physical or mental condition, which defendant introduced as an element of his defense in this case. However, MCL 330.1750(2)(a) applies only in "a civil or administrative case or proceeding," not criminal proceedings. By pleading insanity at trial, defendant did not invoke an automatic waiver of his entitlement to maintain the psychiatrist-patient privilege. See *People v Plummer*, 37 Mich App 657, 660; 195 NW2d 328 (1972), and *People v Wasker*, 353 Mich 447, 450-451; 91 NW2d 866 (1958). As such, I find no basis to except defendant's statements from the statutory protections of MCL 330.1750(1).

While I would hold that the trial court abused its discretion in permitting Keiser and Garza to testify regarding defendant's statements at the time of his presentation and request for admission to KPH, any error was harmless, as there was substantial other evidence of defendant's guilt such that the testimony did not likely undermine the reliability of the verdict in this bench trial. See *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (the standard of review for preserved, nonconstitutional error is whether it is more probable than not that the error in question was outcome determinative).

/s/ Jane M. Beckering