

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK O'NEAL FLUKER,

Defendant-Appellant.

UNPUBLISHED

May 24, 1996

No. 178492

LC No. 93-48824 FC

Before: O'Connell, P.J., and Gribbs and T. P. Pickard,* JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty but mentally ill of first-degree premeditated murder, MCL 750.316b(1)(a); MSA 28.548(1)(a), and of possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). Defendant was sentenced to natural life imprisonment on the murder conviction, and the mandatory two-year consecutive term for the felony-firearm conviction. Defendant appeals his convictions as of right. We affirm.

Defendant first claims that error occurred when the court, in response to the questions from the jury regarding the difference between first-degree and second-degree murder and what would legally establish premeditation, referred the jury back to instructions that the jury had already been provided and informed the jury that in "a nutshell, First Degree murder is premeditated and Second Degree is not." Although defendant objected to the fact that the court allowed the jurors to ask questions regarding the jury instructions, defendant did not object to the specific instructions given by the trial court in response to the jurors' questions. Because these instructions were not objected to they are reviewable only to determine if they resulted in manifest injustice to defendant. *People v Van Dorsten*, 441 Mich 540, 544-545; 497 NW2d 737 (1993). We find no manifest injustice in this case. *Id.* at 545. When a jury expresses confusion regarding the law, it is incumbent upon the trial court to give guidance to the jury by providing them with "a lucid statement of the relevant legal criteria." *People v Martin*, 392 Mich 553, 558; 221 NW2d

* Circuit judge, sitting on the Court of Appeals by assignment.

336 (1974), quoting *Bollenbach v United States*, 326 US 607, 612; 66 S Ct 402; 90 L Ed 350 (1946). The difference between first-degree and second-degree murder is premeditation. *People v Bodely*, 38 Mich App 27, 31; 195 NW2d 803 (1972). The term premeditation encompasses deliberation. *Id.* In response to the jury's questions the court referred the jurors to their copies of CJI 16.1 and CJI 16.5, and informed the jury that the basic difference between first-degree and second-degree murder was that first-degree murder required premeditation. The jury instructions and the oral instruction by the court provided the jury with a lucid, and proper, definition of the difference between the two crimes.

Defendant next argues that he was deprived a fair trial because of prosecutorial misconduct. Because defendant either did not object, or did not timely object, to the allegations of misconduct, we will not reverse unless the failure to do so will result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 551 (1994). Questions of prosecutorial misconduct are decided on a case-by-case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). In reviewing such claims, this Court examines the remarks in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Defendant's claims of prosecutorial misconduct do not require reversal.

Defendant first contends that the prosecutor disparaged him when, in questioning a witness, he compared defendant's actions to O.J. Simpson. Where the prosecutor asks the jury to compare a defendant's character with an infamous person's character, error requiring reversal can result. See *People v Kelley*, 142 Mich App 671, 673; 370 NW2d 321 (1985). However, the mere reference to an infamous person does not automatically require reversal. See *People v Sharbnow*, 174 Mich App 94, 101; 435 NW2d 772 (1989); *People v Smith*, 122 Mich App 106, 111-112; 332 NW2d 428 (1982). The prosecutor's question did not have the effect of disparaging defendant because the question did not ask the witness to compare defendant's character to that of O.J. Simpson's character. Moreover, a curative instruction would have cured any prejudice that may have resulted from the reference to the O.J. Simpson case. See *People v Rowen*, 111 Mich App 76, 82; 314 NW2d 526 (1981).

Defendant next argues that the prosecutor improperly commented on defendant's IQ level as being eighty or ninety when there was no evidence to support this comment. Contrary to defendant's contention, the prosecutor did not argue that defendant's IQ level was eighty or ninety. Instead, the prosecutor argued that defendant was of normal intelligence and that normal intelligence was an IQ level of eighty or ninety. This comment was supported by the testimony of Dr. Lemmen who testified that defendant was "of grossly average intelligence. He may have been low average intelligence. He may have been functioning in the high eighties, low nineties."

Defendant next asserts that the prosecutor improperly referred to the potential penal consequences which defendant could face. It is improper for the prosecutor to refer to the possible disposition of the defendant after the verdict. *People v Wallace*, 160 Mich App 1, 6-7; 408 NW2d 87 (1987). When read in context, the prosecutor's remarks did not refer to the possible disposition of

defendant after the verdict. Instead, the remarks were made to provide an alternative explanation, other than insanity, for defendant's diagnosis of depression shortly after the shooting.

We affirm.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Timothy P. Pickard