STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANUEL A. ORTIZ,

Defendant-Appellant.

UNPUBLISHED
September 20, 1996

No. 171193
LC No. 93126694 FC

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,* JJ.

PER CURIAM.

Defendant appeals as of right from his first-degree murder conviction. MCL 750.316; MSA 28.548. The trial judge sentenced him to life imprisonment.

Defendant argues that the judge's instructions misstated the law and denied him a fair trial. He asserts that the judge erred in allowing hearsay statements to be admitted at trial. He claims that numerous instances of prosecutorial misconduct denied him a fair trial and that the judge impermissibly restricted voir dire. He claims that the prosecutor infringed on his right to remain silent. He argues that he was prejudiced where the jury was improperly informed that he had a prior unspecified record and was currently in jail. Finally, he asserts that he was denied the effective assistance of counsel. We reverse and remand for a new trial.

I

We agree with defendant that the trial judge erred in allowing police officers to testify about previous statements the victim made about defendant's past violent acts.

Officer Weiner, after reading his police report, testified that two days before the murder, he was dispatched to the victim's house. He stated:

> She told me that he had come over. He wanted a place to stay and she refused because of past bad treatment and assaults and she would not let him stay. He became

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

angry and she told me that he threatened to kill her. And he put his hand in his jacket like maybe he had a gun or knife and would do her some harm.

The judge stated that the testimony was admissible under MRE 803(1) or (6). We find that neither of these hearsay exceptions allows admission of the testimony.

The trial judge erroneously admitted part of the testimony under the present sense impression exception to the hearsay rule. MRE 803(1). The exception pertains to "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1); *Johnson v White*, 430 Mich 47, 55-56; 420 NW2d 87 (1988). Whether a statement occurs "immediately" after the event or condition described is necessarily a factual determination. *Berryman v K Mart Corp*, 193 Mich App 88, 100; 483 NW2d 642 (1992). The phrase "immediately thereafter" is not synonymous with "instantly thereafter." *Id*.

On the record before us, we are unable to determine whether the victim's statements occurred within the time frame required to render them sufficiently trustworthy to qualify as a hearsay exception. *Berryman, supra*. Officer Weiner testified that he was dispatched to the victim's house at approximately 6:00 p.m. The record does not indicate how long after the victim perceived defendant's actions that she relayed them to Officer Weiner.

However, even if the part of the statement where the victim described defendant putting his hand into his pocket and pretending to have a gun were admissible under MRE 803(1), her statement that defendant had previously assaulted her was inadmissible. The statement about previous assaults was not made while the victim was being assaulted or immediately thereafter. See *People v DeWitt*, 173 Mich App 261, 268-269; 433 NW2d 325 (1988). Therefore, even if the police record itself was admissible under the business records exception to the hearsay rule, MRE 803(6), the hearsay statements contained within the report were inadmissible.

II

Defendant also argues that the trial judge improperly permitted Detective Susan Brown to read into evidence various complaints contained in police records about alleged assaultive conduct by defendant on decedent. We agree with defendant that MRE 803(6) could not have justified the admission of the records.

The business records exception to the hearsay rule provides that reports or records kept in the course of a regularly conducted business activity are not to be excluded as hearsay unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness. MRE 803(6); *Solomon v. Shuell*, 435 Mich 104, 115; 457 NW2d 669 (1990). Here, the incident report was not admissible as a business record, because the foundational requirement that the declarant must be acting in the regular course of business when making the statement had not been met. *Hewitt v Grand Trunk Western Railroad Co*, 123 Mich App 309, 325; 333 NW2d 264 (1983). Therefore, we find a lack of trustworthiness in the report which renders it inadmissible.

We cannot conclude that the evidence was harmless. Even though there was overwhelming evidence that defendant killed decedent, the inadmissible evidence weighed heavily on the elements of premeditation and deliberation. Therefore, the degree of murder of which defendant should have been convicted was unjustly influenced.

III

Because we are reversing and remanding, we will briefly discuss the remaining issues as they could affect the result in defendant's new trial.

The judge did not abuse his discretion in conducting voir dire. A judge is not required in every case to ask questions submitted by the parties. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). His refusal to pose defendant's questions relating to people's judgment while upset or angry or their racial biases did not prevent defendant from intelligently exercising his peremptory rights. See *People v Daniels*, 192 Mich App 658; 482 NW2d 176 (1991).

We do not find that the prosecutor's questions and closing argument infringed on defendant's right to remain silent. The prosecutor did not treat defendant's silence as substantive evidence of guilt. The prosecutor's questions were concerned with defendant's sobriety and whether he could have premeditated and deliberated before killing decedent. See *People v Miller*, 208 Mich App 495, 507; 528 NW2d 819 (1995).

With respect to the remaining claims of prosecutorial misconduct, defendant was not denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). However, we caution the prosecution not to argue facts during closing argument that were not introduced at trial. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992).

Defendant asserts that the judge gave an incorrect jury instruction on intoxication. Looking at the jury instructions as a whole, we find that they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The judge properly instructed the jury on both first-degree and second-degree murder. He informed the jury that, to find defendant guilty of first-degree murder, it was necessary for the prosecution to prove that defendant had the specific intent to kill. Moreover, that intent had to be premeditated and deliberated.

The judge then instructed the jury that defendant's voluntary intoxication could negate the element of specific intent for first-degree murder. It was not necessary for the judge to repeat his previous instruction regarding premeditation and deliberation. Specific intent is a necessary component of the elements of premeditation and deliberation. It would be difficult, if not impossible, to premeditate and deliberate a killing without having the requisite specific intent. *People v Langworthy*, 416 Mich 630, 650; 331 NW2d 171 (1982).

Finally, defendant was not prejudiced where, on two occasions, witnesses at trial stated or inferred that defendant had been in jail. Following the first occurrence, the judge gave the jury a

cautionary instruction. The second time, the prosecutor stopped the witness before he mentioned that defendant had been in jail.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Marilyn Kelly
/s/ J. Richardson Johnson