

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY P. GRAY,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 180801
LC No. 94-132120

Before: Jansen, P. J., and Reilly, and M.E. Kobza, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty but mentally ill of assault with intent to commit murder, MCL 750.83; MSA 28.278. Defendant was sentenced to twelve to fifty years of imprisonment. Defendant now appeals as of right. We reverse and remand for entry of a judgment of not guilty by reason of insanity and an order committing defendant for psychiatric treatment.

Defendant argues that the prosecution did not present sufficient evidence to prove that defendant was sane at the time of the commission of assault with intent to murder.¹ We agree.

At the time the present offense was committed, legal insanity meant that the person, as a result of mental illness or mental retardation, “lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.” MCL 768.21a(1); MSA 28.1044(1). The statute incorporated by reference the Mental Health Code’s definition of mental illness, which at the time of the offense, was “a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with ordinary demands of life.” MCL 330.1400a; MSA 14.800(4001).² *People v Ross*, 145 Mich App 483, 492; NW2d (1985).

A defendant is presumed sane. However, once any evidence of insanity is introduced, the prosecution bears the burden of proving the defendant’s sanity beyond a reasonable doubt.³ *Id.* at 493. The nature and quantum of rebuttal evidence required to present the insanity issue to the jury varies from case to case and to some extent is determined by the strength of the case for insanity. *People v*

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

Murphy, 416 Mich 453, 464; 331 NW2d 152 (1982). Although the prosecution's and the defense's expert witnesses in this case agreed that defendant was legally insane at the time of the commission of the instant offense, the trier of fact is not bound to accept the opinion of an expert. See, *id.* at 465

The victim in this case, "Zachary", was three years old at the time of the offense. He lived with his mother, Gloria. They moved to Michigan from St. Louis after Christmas, 1993. Defendant and his grandmother, Dorothy, moved in with Zachary and Gloria when they moved to Michigan from St. Louis in 1994. Defendant came to live with Zachary and Gloria the second week in January, 1994, and Dorothy came shortly thereafter. Dorothy and Gloria were raised together as sisters. Both defendant and Zachary referred to Gloria and Dorothy as "mommy" and "mother" respectively. The relationship between Zachary and defendant, who was fifteen at the time of the offense, was described by Dorothy as "[l]ike brothers" and "great" and that they got along "beautifully." Gloria described the relationship between the boys as being "very good", although she also testified that the boys had problems arising out of the fact that they shared a bedroom. Defendant has sub-average intelligence but is at a level above retardation.⁴

Approximately two weeks before the offense, Gloria noticed a change in defendant's behavior. He was more demanding, more boisterous, more opinionated. Before this period, he was for the most part an obedient boy, although if Gloria "pissed him off", he "would have the attitudes, the dispositions, and whatever." Gloria talked to some people at her work about his behavior change.

On Wednesday, three days before the incident, Gloria, Zachary and defendant were laying on the bed watching a video. Zachary coughed in defendant's face, and defendant got very upset and told Zachary, "I am going to whip your butt if you cough in my face," Gloria explained to him that she and Dorothy were the adults and would do the "chastising." Defendant stormed out of the room. Gloria later saw him counting his money for plane fare back to St. Louis. He said he wanted to go home. Gloria told him that she would let him go home that weekend. Gloria testified that defendant's behavior was "more demanding", "snappish", "like me being the child and him being the adult."

The next day after work, she talked to defendant about then being "chastised" and defendant told her, "I don't want to go home. You know I don't want to go home. I just want to stay here. I want to do good and have a good life."

On Friday, defendant talked to family members in St. Louis. Statements that he made that he was going to be going into the light were interpreted by them as indicating possible suicide intentions. They alerted the police, who came to Gloria's apartment. Deputy Sheriff Evans testified that when he came to the door and asked if there were any problems, defendant said, "No'," and was "kind of smiling and just acting normal I suppose." Evans told defendant that the police had received a call from his mother in St. Louis stating that he might attempt suicide. Defendant "just kind of giggled a little bit and said, 'No there's nothing. I was just talking to my mom and that.'" He told the officer that he was homesick. Dorothy said that he was not acting unusual at that time. He later said that he wanted to scare his mother off of drugs.

On Saturday, the day of the offense, defendant told Gloria that all he wanted to do was go home. He “became real boisterous and demanding about he had to go home. He wanted to go home right then-.” He said that he had spoken to a neighbor about driving him to the airport. Gloria told defendant he would be going home Tuesday. Defendant’s response was “[l]ike pouting.” When Gloria spoke with defendant’s mother on the phone, Gloria suggested that defendant might need counseling because she felt like “he was acting somewhat different and—and because he was so forceful about wanting to go home”

Saturday afternoon, defendant went to the mall with a friend. Later in the evening, around 7:00 p.m., Gloria, Dorothy, and Zachary went to a neighbor’s apartment for a party. Defendant went later.

Between 10:30 p.m. and 11:30 p.m., they went back to Gloria’s apartment. Gloria went to bed and Zachary was with her. Dorothy and defendant were in the kitchen talking. Dorothy offered him some food but he said he didn’t want to eat. Dorothy said she was going to take a bath and he said that he was going to take a bath also. When she went in the bathroom, Zachary was not asleep. After Dorothy went in the bathroom near Gloria’s bedroom, Gloria saw defendant in the kitchen wiping the counter, which Gloria thought was unusual because it was already clean. A friend who was at the party testified that she called Gloria’s apartment, defendant answered and told her neither Gloria nor Dorothy were home and hung up. When she called back, she spoke briefly with Gloria. The testimony is unclear about when this occurred. However, Gloria testified that while she was dozing, defendant brought the phone in her room and gave it to her. Zachary was still with her.

Dorothy testified that she was in the bathroom about ten minutes. When she came out of the bathroom she noticed Zachary was no longer with Gloria in the bed. Dorothy woke Gloria and asked her where Zachary was. Gloria said he was with her, and Dorothy responded that he wasn’t. She looked in the boys’ bedroom, then heard Zachary’s voice weakly calling “mommy” and “mother.” She heard defendant telling him forcefully to shut up and be quiet and “It’s okay. It’s okay Zack.” Dorothy yelled and pounded on the door of the bathroom near the boys’ room. Gloria retrieved a can opener from the kitchen and worked on the door. Dorothy left to get a knife and while she was gone, Gloria opened the door. She saw defendant on his knees with both hands in the bathtub on Zachary’s shoulders, holding him underwater. Zachary was laying in the tub naked with his eyes rolled back in his head and was not trying to move or get out of the tub. Defendant did not say anything but turned around and looked at Gloria with a “disgust look”, a “look like I’m busted.” He “maintained himself” kneeling holding Zachary while he stared at Gloria. As she came toward him, he slid up against the wall and curled into a fetal position. Gloria got Zachary out of the water and took him toward her bedroom. Although Zachary was clothed when he was in bed with his mother, he was nude when he was retrieved from the tub. Defendant told Gloria in a “little bit loud” voice, “I’m the only one that can save him.”

Gloria saw Dorothy and gave Zachary to her. In doing so, Gloria and Dorothy noticed that Zachary’s throat was cut. Gloria began dialing the phone. Defendant put his hand on Dorothy’s shoulder and “kind of nudged” her as she was bending over Zachary. Defendant told her to leave Zachary alone because he was the only one that could save him. When he put his hand on Dorothy’s shoulder, Gloria started “whacking him” with the phone. He didn’t say anything. She told him to get out of the room, and they both went into the living room. She asked him why he did it. Defendant

responded, “I’m the only one who can save him. Me. I’m the only one.” Dorothy testified that she went into the living room and heard defendant saying to Gloria “But you don’t understand. I am the only one who can save him.”

Because Gloria had broken the phone, she went upstairs to the neighbors to ask them to call 911. After Gloria became concerned about the time it was taking for the ambulance to arrive, she headed back upstairs, and a neighbor, Curtis, came back down with her. On a third trip upstairs, defendant was behind her. He said in a tone described by Gloria as being sarcastic, “Now what are you going to do Suzie [Gloria’s nickname]? Now what are you going to do?” She had to take his arm and move it to get by.

Even though Gloria had earlier told defendant to get out of her house, he was still around when she left with the neighbor to take Zachary to an emergency center. Curtis’ wife, Elizabeth, testified that she “asked [defendant] why he had done this and he stated to me that he did what he had to do.” When she asked why, he “mentioned something about trying to save Zachary.” She did not want defendant in her apartment, but gave him a coat and told him to sit in a car and to wait outside for the police. He was despondent and “kind of walking around in circles,” “like he was lost.”

At about 12:10 a.m., defendant rang the doorbell at a house nearby. One of the homeowners testified that he asked to use the phone because his car had broken down. Her husband handed defendant a portable phone on the porch. He “looked at it, then he started looking a little confused and he said, ‘I don’t know who to call. I am not from this area.’” Her husband took the phone and they asked him to leave. As they started to close the door, he asked for something warm for his feet. They told him that if he did not leave they would call the police. After they closed the door, he walked back and forth between the porch and the road, and then came back on the porch and rang the doorbell.

When the police arrived, defendant was sitting on the porch with a coat wrapped around his feet. His feet were bare, but a pair of shoes was approximately three feet away from him. According to the deputy, when his police car pulled into the driveway, defendant “raised up.” The deputy got out of the car and turned defendant around to face the wall, cuffed him and placed him in the back of the patrol car. The deputy described defendant as cooperative, although his arm was stiff as though he were “not going along with it—with the intention that you had.” The deputy stated that defendant was “very polite and he went along with everything he had been told to do.” Later, when the deputy drove defendant to Children’s Village, he joined in a conversation the deputies were having about the weather. He also asked if he was going to jail.

The pediatric surgeon who treated Zachary testified that the wound was seven or eight centimeters in width.⁵ The windpipe was scratched, but not pierced, and the main artery and vein were not cut. When Zachary woke up from surgery, he told the nurse that defendant put his hand over his mouth and cut him. Testifying from the contents of her notes in Zachary’s chart, the nurse further described Zachary’s statement by reading from her notes:

“‘And he cut me.’ Patient stated this three times. He then stated [‘in the closet.’]”
And I state here that I wasn’t sure as to what Danny was referring about in a closet. I

wasn't able to make out the rest of what he was saying about a closet. "He also states, 'Danny says he didn't give me that stuff. I need batteries for my gun. I got to get him because he hurt me.' Patient also started then talking, 'Jimmy, he is Danny's friend, Jimmy upstairs.' Patient then went on to tell a story about a broken car and a truck and Kesha. The nurse is unable to understand this story [what] the patient is talking about these people."

The closet in Zachary and defendant's room had blood on the wall and a puddle of blood on the floor.

Dorothy testified that she asked defendant approximately two weeks after the incident why he had done it. "He said he was sorry and that he wanted to go home. That he didn't know why he done [sic] it." He told her that "he had been feeling like something was wrong for a few days and I asked him why didn't he say something to someone and he said that he thought I would put him in an institution."

Gloria heard defendant have religious conversations with Dorothy before the incident. She heard him ask if it was true that everyone had a purpose and said, "I don't have a purpose anymore." In another conversation, he told Gloria that he controlled everything. She told him that "God has the control."

Dorothy testified that between Wednesday and Saturday night, defendant began to discuss the subject of religion quite frequently. He asked, "Is it true that you have to be baptized to enter the kingdom of heaven?" She told him yes. One night, he woke her up, pulling on her to get up. He said he needed to talk and insisted that they go in his room. She began to feel a little afraid. He said he needed her to hold his hand so he could go to sleep, that "if he fell asleep and I was holding his hand he wouldn't die." Also during that period, he came to her and told her something was wrong with his face and that he had seen his face changing. When she tried to explain things to him, he did not seem to understand. At one point, she asked him, "Danny, what is wrong with you?" and he responded that nothing was wrong and that she wouldn't understand. Dorothy also referred to defendant talking about "the light and me going with him into the light," She testified that she did not interpret that as being a religious conversation, but that it was "scary and it was an eerie feeling from him saying that to me."

Dorothy testified that between Wednesday and Saturday, he was not bathing like he normally did and he wasn't eating or sleeping. She added:

The person that I knew that you were talking about previously was not the same person that was what was going on with him the mid week into the Saturday that this happened. This was like two different people.

Detective Young testified that he picked defendant up from Children's Village on the day of his arraignment, and that there was nothing unusual about his behavior while he was being transported. Defendant never said anything to him. After the arraignment, Detective Young escorted defendant out of the building. There was no problem until the news reporter and the camera showed up. Then

defendant started saying he was God, he had the power and if they touched him they would die. Once defendant was in the patrol car, there weren't any further incidents.

Dr. Shazer conducted the court-ordered evaluation of defendant at the Center for Forensic Psychiatry. Danny told Dr. Shazer that he got the knife some minutes before he cut Zachary's throat. He held his hand over Zachary's mouth to prevent him from yelling so that nobody else in the house would come and interrupt him. He "had come to believe that the devil was inside of Zachary, that the way to get the devil out of him was to cut his throat, that that would somehow release the devil, and so he needed to do that." He began to develop these beliefs two or three days before the crime. After cutting Zachary's throat, defendant took him into the bathroom and wanted to hold him under the holy water to heal the wound.

Defendant told Dr. Shazer that he stopped sleeping two or three days before the crime because he believed that if he did "some force, some person would come to him in his sleep and kill him." He reported hearing voices beginning on the Wednesday before the incident and that "eventually they took over his head and it was at that point that he came to believe that he was God." The voices, neither male or female, told him that if he went to sleep he would be harmed or killed. He also reported that he began to "feel sick to his stomach at times and stopped eating almost altogether." The doctor testified that these symptoms are significant in that people who are "malingering" typically don't know that they are supposed to be having these symptoms. Defendant's change in bathing was also a symptom of a psychotic disorder. Dr. Shazer testified that defendant was mentally ill at the time of the offense and further that "because of defendant's delusions he did not—could not appreciate the wrongfulness of his conduct." Dr. Shazer felt that it was not as clear that defendant could not conform his conduct to the requirements of the law. "However, I think it's very, very clear, again based on all of the evidence, that Danny did not appreciate the wrongfulness of his conduct at the time."

As a rebuttal witness, the prosecution presented Dr. Margolis, a professor of psychiatry at the University of Michigan who conducted an independent evaluation of defendant at the prosecution's request. Defendant's account to Dr. Margolis was consistent with that provided to Dr. Shazer, with some additional details. He told Dr. Margolis that he felt "very strongly that he needed to get the devil out of [Zachary], and he decided this had to be done a few minutes before—before he did it". He got a knife and ran some water in the bathtub. He enticed Zachary, who was laying with his mother but was not yet asleep, to come to the boys' room to play with a video game in the closet. He cut Zachary's throat once and carried him into the bathroom and put him in the tub. He locked the door because "he did not want to be disturbed when he was healing—healing, baptizing [Zachary], that he couldn't be disturbed, and that only he had the power to do this." He did this to get the devil out of Zachary and that he "had to do this." Dr. Margolis stated, "[T]here was a very compelling quality about it even as he told me about it you know eight months later . . ." Defendant reported that he heard voices coming from inside his head and from the trees beginning a couple of days before the crime. The voices frightened him and he felt that he might be killed. At times, he felt that the devil was inside of him as well as Zachary. He also thought that he was God and that only he had the power to get the devil out of Zachary and heal him.

Dr. Margolis testified that he believed that defendant was experiencing an acute psychotic episode, that he was delusional and hallucinating at that time. Dr. Margolis believed that he was not responsible for his actions. Dr. Margolis did not believe that defendant meant any ill harm to Zachary when defendant held the knife to Zachary's throat.

In *Murphy, supra*, the Court held that there was insufficient evidence of sanity, despite testimony from four police officers that at the time of his arrest, the defendant seemed to understand and did not seem to be "out of touch with immediate reality." *Id.* at 462.

A lay witness's observation of abnormal acts by the defendant has greater value as evidence than testimony that the witness never observed an abnormal act unless the witness had prolonged and intimate contact with the accused. The officers' testimony that the defendant seemed all right has only slight probative value. Moreover, it is not clear that the witnesses' testimony actually negated any part of the insanity test, which requires the prosecutor to prove that the defendant could appreciate the wrongfulness of his conduct and had the capacity to conform his conduct to the requirements of the law. Something more is needed than was presented here in order to pass appellate muster. [*Id.* at 466. Citations omitted.]

In this case, viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence of sanity was insufficient to convince any rational trier of fact that defendant was sane beyond a reasonable doubt. We recognize that the testimony of lay witnesses may be competent evidence of sanity and may rebut expert testimony on the issue of sanity. *Id.* at 465. In this case, however, the testimony of the lay witnesses who had the best opportunity to observe defendant's behavior for a prolonged period of time provided further support for the experts' conclusion that defendant was insane. As in *Murphy*, there was testimony that indicated that defendant was not acting strangely at all times before and after the incident. However, also as in *Murphy*, all of the vital evidence in this case pointed towards defendant's insanity at the time of the offense." *Id.* at 467.

In light of our conclusion, it is unnecessary to resolve defendant's other allegations of error.

Reversed and remanded for entry of a judgment of not guilty by reason of insanity and an order committing defendant for psychiatric treatment pursuant to MCL 330.2050; MSA 14.800(1050).

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza

¹ Effective October 1, 1994, the Legislature shifted the burden of proof from the prosecutor to the defendant. The defendant now has the burden to establish his insanity by a preponderance of the evidence. MCL 768.21a(3); MSA 28.1044a(3). However, because the instant offense was

committed on January 29, 1994, the amendment to the insanity statute is inapplicable to the case at hand, and the prosecutor had the burden of proof that defendant was sane at the time of the offense.

² MCL 330.1400a; MSA14.800(4001) was repealed by 1995 PA 290 § 2 effective March 28, 1996.

³ See n 1.

⁴At sentencing, the social services intake worker stated that defendant is borderline retarded, “on the border of being retarded but not necessarily retarded per se.”

⁵ The doctor also stated that there were at least two cuts on Zachary’s neck. It is unclear whether there was more than one wound or if the doctor was indicating that the seven or eight centimeter wound was the result of at least two cuts.