

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CLYDE LOREN HUNT,

Defendant-Appellee.

UNPUBLISHED
October 31, 1997

No. 198170
Macomb Circuit Court
LC No. 94-001481-FC

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order granting defendant a new trial. We vacate the order granting defendant a new trial and remand for reinstatement of defendant's conviction and sentence.

At the time of the incident out of which this case arises, defendant had a young child with his wife as well as a one-year-old son, Tyrell, with Charise Banks, a woman with whom defendant was having an extra-marital affair. In February, 1994, defendant visited Banks and his son. While Banks left her residence for a short period of time, defendant was alone with his son. When Banks returned, the child had vomited and was sick. Defendant and Banks subsequently took the child to the hospital, where the child almost died. It was ultimately determined that the child had ingested diazinon. Defendant was convicted of attempted murder, MCL 750.91; MSA 28.286, and sentenced to forty to sixty months' imprisonment. Defendant subsequently moved for a new trial on the grounds of prosecutorial misconduct and ineffective assistance of counsel. Following an evidentiary hearing, the trial court granted the motion on both grounds.

Plaintiff argues on appeal that the trial court abused its discretion in granting defendant a new trial. We agree.

MCR 6.431(B) provides:

On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict

has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made part of the record.

We review the grant of a new trial for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 578; ___ NW2d ___ (1997). In determining whether the trial court abused its discretion, we must examine the reasons given by the trial court in granting a new trial. *Id.* at 580. We will find an abuse of discretion where the reasons given by the trial court are not legally recognized or are not supported by any reasonable interpretation of the record. *People v Bart (On Remand)*, 220 Mich App 1, 11; 558 NW2d 449 (1996); see also *Leonard, supra*.

We first review plaintiff's argument that the prosecutor did not commit misconduct warranting a new trial. The trial court granted a new trial on this ground because it determined that defendant had been denied a fair and impartial trial by the prosecutor's presentation of a theory that was not supported by the evidence. Specifically, the court noted that the prosecutor had argued that defendant had attempted to kill his son "in an effort to conceal [the child] from his wife" and "keep [his wife] from knowing of the birth of [the child]." The court found this argument erroneous where the prosecution had information before trial that defendant's wife had known about defendant's affair with Banks and the birth of defendant's son.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). A trial court's finding of prosecutorial misconduct is a mixed question of fact and law. *People v Tracey*, 221 Mich App 321, 323; 561 NW2d 133 (1997). This Court reviews questions of fact under the clearly erroneous standard and questions of law de novo. *Id.* at 323-324.

In this case, the trial court's reason for granting defendant a new trial was certainly a legally recognized reason. However, we conclude that the reason given by the trial court for the grant of a new trial, i.e., that the prosecutor argued a theory not supported by the evidence, is clearly erroneous and not supported by any reasonable interpretation of the record. *Tracey, supra; Bart, supra*.

Our review of the record reveals that there was little dispute at trial concerning whether the poisoning was accidental or intentional. Rather, the primary issue was the identity of the person who intentionally poisoned the child. The evidence indicated that the perpetrator could only have been Banks or defendant. Thus, the prosecutor's theory was that defendant intentionally poisoned his son. As part of this theory, the prosecutor argued during closing argument that defendant's motive for committing the crime was that defendant simply did not want, and had never wanted, his son. As evidentiary support for defendant's alleged motive, the prosecutor relied on the circumstantial inferences arising from defendant's course of conduct beginning while Banks was pregnant. Specifically, the prosecutor noted the evidence that during Banks' pregnancy defendant's wife was also pregnant, that defendant suggested both abortion or adoption to Banks, and that defendant told Banks that he did not want the child to have his last name. The prosecutor noted the evidence that Banks had filed a paternity action after the child had been born, that defendant had defaulted in this action, and that the poisoning occurred approximately eighteen days before a scheduled hearing at which defendant would officially be deemed the father of the child and required to pay child support. The prosecutor further noted the

evidence that defendant did not show any emotion or ask any questions while at the hospital with the child, and that defendant visited the child sparingly, if at all, between the time of the poisoning and the time that defendant was restricted from seeing the child.

As part and parcel of the motive theory, the prosecutor argued the reasonable inferences arising from the evidence of defendant's course of conduct with respect to his wife. Specifically, defendant's statement to Sergeant Waldoch, the investigating police officer, was admitted at trial, indicating that defendant had not told his wife of Banks' pregnancy, but rather that defendant's wife had become aware through an anonymous letter that Banks was pregnant with defendant's child as early as Banks' sixth month of pregnancy. Banks testified that she had told the investigating officer that defendant's wife did not believe that defendant was the father of Banks' son unless there was a blood test. From this evidence, the prosecutor argued as follows with respect to defendant's motive:

March 14th of 1994 was judgment day for Defendant. Almost as serious in his life as D-Day was to the soldiers, the allied soldiers who invaded Normandy in 1944, because March 14, 1994, was the date on which the Wayne County Circuit Court would enter an order not only ordering Clyde Hunt to pay child support for the following 17 years, but also ordering him to pay past child support, and maybe most importantly, declaring legally, absolutely and finally that he was the father of this child, and that has some consequences on Clyde Hunt, a married man, with a young daughter
.....

* * *

Next, the Defendant did not inform his wife that Charise was pregnant. Now, I'm not suggesting to you that a man who fathered a child out of wedlock, a man who's married to another woman is going to run home and say, great news my love [sic] one, I just impregnated another woman and she's six months pregnant. I mean, that's not great news that you want to share with your wife. But he never told her. Never told her.

An inference there is, you can draw a conclusion that he did not want her to know. Right? If you don't tell somebody, your wife, probably one of the most important details in your life, mainly, that you're about to be a father out of wedlock, that's something he didn't want her to know.

And he told Sgt. Waldoch that somebody sent a letter anonymously to his wife. So now his wife knows.

And we don't know what conversations ensued between Defendant and his wife. But one can logically reach a conclusion that he denied it.

And remember, there's testimony in this record through Charise Banks on Direct Examination that the wife didn't believe it without a blood test. Didn't want her to know. Probably denied it.

* * *

So Clyde Hunt, November, 1994, -- excuse me, November 4, 1993, learns through personal service, meaning somebody from either the court or hired by the court finds Clyde Hunt and says, here you go, here's a lawsuit against you, happy birthday. And it tells him, and you'll see the exhibit 6 through 10, says, hey, you can't hire an attorney or afford an attorney we'll appoint one for you, and you can contest this if you want. You can save everybody a lot of trouble by acknowledging you're the father. Or you can do nothing. And that's what Clyde Hunt chose to do, delaying the inevitable. Because had he acknowledge [sic] right around November 4th that he was the pop, then there would have been a court order entered much earlier.

And then, of course, how would he explain to his wife, hey, I acknowledged I'm the father.

* * *

Now, much light has been made of the fact, fact that Charise doesn't have a phone call -- or doesn't have a telephone. But the Defendant wants to find out whether his son is in the hospital he could find out. He's asking the sergeant. Is this a concerned father? Or is it a father who's trying to get rid of the kid because the kid's an albatross hanging on his neck. It's like the Sword of Damocles hanging from the ceiling. His wife will find out. He's going to have to pay child support. He doesn't want the kid. Never wanted the kid.

* * *

Doesn't tell his wife about the pregnancy. Okay. Maybe many men wouldn't. But he doesn't want her to know. How will she know for sure? Well, besides the legal paper saying, I, Clyde Hunt, hereby acknowledge that I'm the father, she knows. If there's a court hearing and the judge finds that he's the father, well, he's going to have trouble explaining that.

The prosecutor's argument makes clear that defendant's wife knew about defendant's out-of-wedlock child. However, the reasonable inference nevertheless arises that defendant had not wanted his wife to know about the child from the evidence that defendant did not tell her about the child himself. From the evidence that defendant's wife would not believe that defendant was the father unless there was a blood test, a reasonable inference arises that defendant denied being the father and that the date scheduled for the paternity hearing, at which defendant would actually be declared to be the child's father, did constitute, as argued by the prosecutor, "judgment day" for defendant. A prosecutor is free

to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). We conclude that the prosecutor's argument in this case was based on the evidence and the reasonable inferences arising therefrom. A new trial is not warranted on this ground.

The trial court's opinion also appears to find prosecutorial misconduct by imputing to the prosecutor Waldoch's withholding of "material information obtained as a result of his [Waldoch's] investigation." Under the court rules and principles of due process, a prosecutor has a duty to provide certain information to a defendant. *Tracey, supra* at 324. Moreover, in certain circumstances, this Court will impute to the prosecutor errors committed by the police. See, e.g., *People v Canter*, 197 Mich App 550, 570; 496 NW2d 336 (1992). However, our review of defendant's testimony at the evidentiary hearing in this case reveals that any information not disclosed by Waldoch in his police report concerning his interview with defendant's wife¹ was fully known by defendant. However, for tactical reasons, defense counsel decided not use this information at trial. Moreover, our review further reveals that any omissions by Waldoch were not undertaken deliberately, intentionally or in bad faith. Thus, even assuming error on the prosecutor's part via Waldoch's failure to disclose certain information, we conclude that the error, whether of constitutional or nonconstitutional magnitude, did not prejudice defendant and was harmless beyond a reasonable doubt. *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996); *People v Anderson (After Remand)*, 446 Mich 392, 404-407; 521 NW2d 538 (1996). Accordingly, a new trial is not warranted on this ground.

Next, we consider plaintiff's argument that defense counsel's performance was not so deficient as to warrant a new trial. We agree. In this case, the trial court gave several reasons for granting a new trial on the ground of ineffective assistance of counsel. We consider them in turn. First, the trial court determined that the defense strategy of lead defense counsel, Robert Morris, was confusing:

Attorney Morris testified at the evidentiary hearing his strategy was to confuse the jury and thereby create reasonable doubt. While he apparently did not create a reasonable doubt in the minds of the jury, he clearly did follow a confusing strategy. For example, in his opening statement, attorney Morris proceeded on the theory the poisoning of Tyrell [defendant's son] was accidental. During trial, however, he conceded the poisoning was intentional. Additionally, in his closing statement, attorney Morris contradicted his own client's testimony which was introduced through defendant's statement to police. In that statement, defendant indicated he did not believe Ms. Banks could have poisoned Tyrell. In closing, however, attorney Morris argued for the first time that Ms. Banks must have poisoned Tyrell. No testimony was presented during trial to support this claim.

A defendant who claims that he has been denied the effective assistance of counsel must establish that the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceeding would have been different. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). The defendant must overcome the strong presumption that the assistance of counsel was sound trial strategy. *Id.*

Decisions concerning what witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy. *People v Bass (On Rehearing)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 178342, issue 7/25/97), slip opinion at p. 5. Generally, counsel should not be second-guessed on matters of trial strategy. *Stewart, supra* at 42. That a strategy is unsuccessful does not constitute ineffective assistance of counsel. *Id.* Rather, ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense. *Bass, supra*. A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* However, in order to overcome the presumption of sound trial strategy, the defendant must show that counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the accused. *Id.* at 6.

As indicated previously, the evidence in this case left little doubt that the poisoning was anything but intentional. Defense counsel's testimony at the evidentiary hearing indicates that he had concluded as much even before the start of trial. Thus, the central issue in the case was the identity of the perpetrator, i.e., either defendant or Banks. As acknowledged by the prosecutor at trial, the evidence that defendant was the perpetrator was entirely circumstantial. Thus, as indicated by both the record and the trial court's opinion, defense counsel utilized a general defense of attempting to confuse the jury for the purpose of creating reasonable doubt. Specifically, defense counsel testified that his strategy going into trial was to attempt to point the finger at Banks and establish that Waldoch's investigation was so "lack luster" that the jury would not be persuaded beyond a reasonable doubt that defendant committed the crime. However, counsel testified that he did not want to antagonize Banks because he also anticipated favorable testimony from her. Counsel testified that, therefore, he did not point the finger at Banks during opening statement because he did not want to signal his intentions to Banks before she testified.

Counsel did inform the jury during opening statement that the evidence would show that approximately three weeks before the poisoning an insecticide company had put down diazinon in Banks' residential complex. Counsel did not characterize these facts as indicative of accidental poisoning. When the prosecutor attempted to point out for the jury during rebuttal argument that defendant's "game plan" had changed from an accidental poisoning to an intentional poisoning by Banks, counsel objected. The trial court reviewed a transcript of counsel's opening statement and then instructed the jury to ignore the prosecutor's argument on the ground that "no where is it indicated in there [opening statement] that he's [defense counsel] claiming this was an accidental situation." Thus, it is puzzling to this Court why the trial court, in its opinion granting defendant a new trial, now characterizes counsel's opening statement as proceeding "on the theory the poisoning of Tyrell was accidental." In addition, we fail to understand how the jury could have been confused in light of the trial court's specific instruction that counsel had not argued accidental poisoning during opening statement.

Moreover, contrary to the court's conclusion, the record supports counsel's testimony that during trial he elicited evidence that, taken together, formed the basis for an argument that Banks was the perpetrator. Thus, during closing argument counsel was able to argue with an evidentiary basis that Banks was the person who poisoned Tyrell. Further, counsel explained that he did not believe that this

argument erroneously contradicted defendant's prior statement to the police (defendant told Waldoch that he did not believe that Banks could have poisoned Tyrell) because he (counsel) had concluded that defendant's statement did not cast suspicion on defendant, but rather was simply the opinion of defendant, who obviously cared about Banks, concerning his belief and faith in Banks. Counsel also testified that he believed that this statement could actually strengthen defendant's credibility. In light of the evidence actually presented and the limited options in terms of available defenses, we conclude that counsel's strategy of attacking Banks and the police investigation was a legitimate strategy. The fact that it did not work does not provide a basis for concluding that counsel was ineffective. *Stewart, supra*.

Second, the trial court concluded that counsel should have presented the testimony of defendant's wife in order to negate the prosecutor's theory of the case. However, the extent of such refutation is arguable given that there was no dispute that defendant's wife found out about Banks' pregnancy through an anonymous letter rather than from defendant. In addition, defendant's wife testified at the evidentiary hearing that she had wanted defendant to take a blood test "to make sure that it was his child." Thus, even if defendant's wife had testified at trial, the prosecutor could still have argued that the reasonable inferences raised by the above facts was that defendant had not wanted his wife to know about his son and that he was probably continuing to deny that he was the father.

Moreover, the record indicates that counsel was aware of the proposed testimony of defendant's wife. However, counsel testified that he advised defendant against having defendant's wife testify at trial. Counsel testified that he had concluded that any relevance to defendant's wife's testimony was outweighed by the potential backlash against defendant if the jury learned during her testimony that defendant, a black man, was essentially unemployed and having an affair with a black woman who was collecting welfare while married to a white woman who was working full-time to support her family. Counsel testified that he believed that the jury might look at these facts "offensively as a fact that he was taken [sic] advantage of his wife." Accordingly, we cannot say that the testimony of defendant's wife might have made a difference in the outcome of the trial. Thus, we likewise cannot say that counsel's failure to call defendant's wife as a witness deprived defendant of a substantial defense. *Bass, supra*.

Third, the trial court concluded that counsel should have called character witnesses to establish that defendant was a loving and caring father who could not have possibly attempted to poison his son. However, counsel explained that he did not believe that he needed to call such witnesses because he believed that he had established his theories that Banks was the perpetrator and that Waldoch's investigation was so inadequate that there was not enough evidence to convict defendant. This was a tactical decision that should not be second-guessed. *Stewart, supra*. The fact that it did not work is not a basis for finding ineffective assistance of counsel. *Id.*

Fourth, because only one question was asked of the prospective jury panel, the trial court determined that Morris failed to conduct an adequate voir dire with respect to the critical and sensitive issues of adultery, infidelity, illegitimacy, and inter-racial marriage. We note that Morris assigned the conduct of jury voir dire to assistant defense counsel Terry Wash. We assume that Wash erred in failing to question the jury concerning whether they held any biases against someone who commits

adultery or fathers an illegitimate child. However, even assuming such error, there is no indication that the result of the proceeding would have been any different had Wash asked proper questions during voir dire because, based on the evidence presented, it is likely that defendant would have been convicted of attempted murder regardless of the jurors' views on adultery or illegitimacy. *Stewart, supra*.

Fifth, the trial court determined that Wash argued an incorrect standard during the motion for a directed verdict. However, the trial court utilized the correct standard in evaluating the motion. Thus, defendant could not have been prejudiced by the error. *Id.*

Finally, the trial court determined that Morris' contacts with defendant had been minimal. However, even if Morris did have minimal contacts with defendant, it is not likely that defendant was prejudiced because, on this record and without the distorting effect of hindsight, there is no indication that Morris could have presented a better defense if he had had more meetings with defendant. *Id.*

In sum, we conclude that the trial court abused its discretion in granting defendant a new trial on the grounds of prosecutorial misconduct and ineffective assistance of counsel. We vacate the order granting defendant a new trial and remand for reinstatement of defendant's conviction and sentence.

/s/ Michael R. Smolenski

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage

¹ Specifically, Waldoch testified that his report contained only a summary, rather than every detail, of his conversation with defendant's wife concerning the wife's knowledge of defendant's relationship with Banks and Tyrell. In addition, Waldoch failed to include in his report defendant's wife's claim that she had been harassed by Banks.