STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YONG IL OH,

Defendant-Appellant.

UNPUBLISHED
March 27, 1998

No. 195327
Kent Circuit Court
LC No. 94-001548-FC

Before: Markman, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of assault with intent to commit murder, MCL 750.83; MSA 28.278. The trial court sentenced defendant to a term of fifteen to forty years' imprisonment. We affirm.

Defendant, a martial arts instructor, stabbed and severely wounded his estranged wife on June 3, 1994, after she returned to defendant's place of business to pick up their two children from visitation. At trial, defendant asserted a diminished capacity defense and presented expert testimony in support of this theory. Alternatively, he contended that the requisite intent was not proven because he stabbed his wife in the heat of passion produced by adequate provocation. The jury was instructed on the charged offense of assault with intent to commit murder, as well as lesser offenses of assault with intent to do great bodily harm less than murder and felonious assault. However, the jury found defendant guilty as charged.

On appeal, defendant first contends that that trial court made four evidentiary rulings that deprived him of a fair trial. The decision to admit evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling. *Id.*

Defendant's first evidentiary complaint is that the trial court abused its discretion in ruling to admit photographs which showed defendant's nine-year old son splattered with blood from his mother's stab wounds. The son had attempted to intervene on his mother's behalf as defendant stabbed her.

When ruling, the trial court noted that it might have been better to admit only photographs of the wounds, but nevertheless determined that the photographs of the splattered blood were relevant to the intent element of the charged offense because they illustrated the extent of the injuries caused by defendant's acts. We agree. MRE 401; *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Further, we hold that the trial court did not abuse its discretion in its application of MRE 403, by not excluding the photographs on the basis of unfair prejudice. *Mills, supra* at 75. A photograph is not rendered inadmissible merely because it brings to the jurors the details of a gruesome or shocking crime. *Id.* at 77.

Defendant next argues that the trial court improperly allowed Detective James Emaus to testify regarding statements made by defendant during a post-arrest interview. We disagree. Defendant's reliance on *People v McGillen #1*, 392 Mich 251; 220 NW2d 677 (1974), is misplaced because in this case, a defendant's statement was inadmissible because the prosecution failed to show that the statement was made knowingly and intelligently. There, evidence existed that a police officer knowingly testified in support of a modified version of the defendant's statement. *Id.*, at 263-64.

In contrast, the question in the instant case concerned the accuracy of Detective Emaus' trial testimony regarding defendant's statements. Detective Emaus' testimony was that he could not recall if he took notes when he interviewed defendant, but that he typed up defendant's statements "as he told them" for a report within a couple hours of the interview and that he included only those statements that applied to this case. The record does not support defendant's claim that Detective Emaus paraphrased and editorialized his statements. We note that although a proper foundation required that the evidence be sufficient to show that Detective Emaus had personal knowledge of the statements, MRE 602, the trial court's ruling to admit the testimony did not preclude defendant from testing its weight and credibility. MRE 104(e). In light of this record, we conclude that the trial court did not abuse its discretion in allowing Detective Emaus to give testimony on defendant's statements because the objection raised by defendant concerned the weight or credibility of the evidence, and not its admissibility. See *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984).

Defendant next contends that the trial court improperly admitted, pursuant to MRE 803(8), a report from the prosecution's rebuttal expert regarding defendant's diminished capacity defense. We agree because MRE 803(8) does not allow the admission of evaluative and investigative reports. *Bradbury v Ford Motor Co*, 419 Mich 550; 358 NW2d 550 (1984). However, the record indicates that the report was not to be provided to the jury unless it was necessary to answer foundational questions at trial, and there is no record that such a request was ever made to publish the report to the jury. Further, the expert testified fully at the trial regarding his evaluation of defendant's criminal responsibility, relying heavily upon his report. Under these circumstances, the trial court's error in ruling to admit the exhibit does not require reversal because defendant's substantial rights were not affected by the error. MRE 103(a). See also *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996) (miscarriage of justice standard in MCL 769.26; MSA 28.1096 applies to nonconstitutional error); *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995) (appropriate test for whether nonconstitutional error requires reversal is whether there is a reasonable probability that the error affected the outcome of the trial).

Finally, defendant contends that the trial court erred in allowing Officer Robert Johnson to testify on rebuttal regarding an incident wherein defendant fell out of a vehicle with a belly chain attached to him while being transported for a forensic psychological evaluation. The test for whether rebuttal evidence is properly admitted is whether it is properly responsive to evidence introduced or a theory developed by the defendant. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. *Id.* at 399. In the instant case, evidence that defendant, a tae kwon do expert, fell during the assault on his wife was used by the defense to support a diminished capacity theory. The prosecution responded by offering evidence that defendant later fell, while clearly sober, in order to weaken this theory. In our judgment, the trial court's decision to allow this evidence, over the defense objection that the testimony was "irrelevant and incompetent . . . with respect to our theory of the case," was a proper exercise of discretion. *Id.*, at 398.

We also believe that the deputy's reference to the fact that defendant was in a "belly chain" at the time when he fell is more applicable to a MRE 403 analysis, and find that the objection raised by defense counsel at trial was insufficient to preserve this MRE 403 issue for appeal. See *People v Johnson*, 205 Mich App 144, 148; 517 NW2d 273 (1994). Moreover, we conclude that defendant has not established any plain error affecting his substantial rights. MRE 103(d). Although a defendant's shackled appearance in a courtroom may reverse the presumption of innocence by causing jury prejudice, even shackling before a jury is permitted in extraordinary circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Here, however, the jury itself was never exposed to defendant in a shackled condition. Having already been made aware of defendant's arrest for a violent crime, we do not find it prejudicial to defendant that the jury was apprised, incident to a relevant argument, that defendant was bound at the time.

In sum, we conclude that the trial court did not abuse its discretion in overruling defendant's objection to the rebuttal evidence. Further, we hold that defendant has not established any alternative grounds for relief under the plain error standard of MRE 103(d).

Defendant next argues that there was insufficient evidence to establish the charged offense because he acted in the heat of passion. Evidence is sufficient when, viewed in a light most favorable to the prosecution, it permits a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993). The elements of an assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). If the defendant would have been guilty of manslaughter (due to an absence of malice), there can be no conviction for assault with intent to commit murder. *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988). However, there are several components which comprise the test for voluntary manslaughter: (1) defendant must kill in the heat of passion, (2) the passion must be caused by adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). A homicide may be reduced from murder to voluntary manslaughter if the factfinder determines from an

examination of all the circumstances surrounding the killing that malice was negated by adequate and reasonable provocation, and the homicide was committed in the heat of passion. *People v Hopson*, 178 Mich App 406, 411; 444 NW2d 167 (1989). Passion in this context describes a state of mind incapable of cool reflection. *Id.* at 411.

The evidence in the case at bar establishes that defendant was already angry with his estranged wife when she initially dropped off their two children for visitation. As the children exited the car, defendant yelled at his wife and threw several baseball cards in her face because he blamed her for the fact that he owed monetary damages in an alienation-of-affection lawsuit (as well a countersuit for emotional distress) that he filed against a man whom defendant thought might be having an affair with his estranged wife. After she left the area, defendant drank beer and asked the children if their mother was having an affair with the man whom he had sued. As the night went on, defendant called his estranged wife five times regarding such matters as his visitation rights with the children. Defendant was clearly angry, but his wife thought that defendant had calmed somewhat by the time of their last phone conversation. She returned to defendant's place of business to pick up the children approximately five hours after she had dropped them off, and defendant confronted his wife about whether she was sleeping with the man whom he had sued. When defendant appeared angry and accused her of lying by denying it, she quickly replied, "Okay, I'm sorry, I'm sorry, I just want to go home." Defendant then told his estranged wife that "you're gonna have to die tonight," dragged her into a bathroom in the building and repeatedly stabbed her while one of the sons tried to intervene to stop defendant. His wife was severely wounded but survived. After Officer Brad Schutter arrived at the scene, defendant told him, "I just don't care anymore. She makes me mad. I don't care."

Viewed in the light most favorable to the prosecution, we conclude that the evidence was sufficient for a rational factfinder to find that defendant stabbed his estranged wife with an intent to kill under circumstances that would have made the killing murder, if he had been successful. Hence, the evidence was sufficient to find an assault with an intent to commit murder.

Defendant next argues that the jury verdict was against the great weight of the evidence. A trial court's decision to deny a motion for new trial on the ground that the verdict is against the great weight of the evidence will not be disturbed on appeal unless a clear abuse of discretion has been shown. *Herbert, supra* at 477. Although the trial court apparently acts as a "thirteenth juror" when deciding such a motion, the trial court must exercise this power with great caution, mindful of the special role accorded jurors under our constitutional system of justice. *Herbert, supra* at 476-477; *People v Bart (On Remand)*, 220 Mich App 1, 13; 558 NW2d 449 (1996).

In the instant case, the trial court found that the evidence of the assault was overwhelming, with the only real issue being the defense of diminished capacity. However, the court denied defendant's motion because, although the jury could have gone either way on this issue, there was more than adequate evidence for the jury's decision. Diminished capacity is relevant to the question of whether a defendant has the ability to form the specific intent necessary to commit a crime. *People v England*, 164 Mich App 370, 375; 416 NW2d 425 (1987). However, even when expert testimony is presented to assist a jury to decide this question, as in this case, the existence of specific intent is a matter to be decided by the trier of fact. *People v Denton*, 138 Mich App 568, 573; 360 NW2d 245 (1984).

Based on the evidence in the case, we find no abuse of discretion in the trial court's conclusion that the verdict was not against the great weight of the evidence.

Defendant next contends that the trial court erred in denying his motion for new trial based on ineffective assistance of counsel following an evidentiary hearing held pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the strong presumption that the assistance of his counsel was sound, and he must show that, but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996).

First, with regard to the attorneys' failure to move to suppress defendant's post-arrest statements under a theory that the statements were involuntary, we note that the attorneys testified at the *Ginther* hearing that they found no need to seek a suppression hearing in light of the trial strategy that defendant was going to testify and admit that he stabbed his estranged wife. Attorneys are to be afforded "broad discretion in their choice of trial strategy, even if it ultimately does not prove successful. *Pickens*, *supra* at 325. Also, as was correctly determined by the trial court, any usefulness to the prosecution of defendant's statement to the police paled in comparison to the effects of his earlier statements to his wife and children. We conclude that the trial court correctly denied a new trial on this ground since even if we assume that a pretrial motion to suppress the statement to the police would have been granted, there was no reasonable probability that the outcome of the trial would have been different in light of the overwhelming evidence. *Stewart (On Remand)*, *supra* at 41.

We also reject defendant's claim that his attorneys' failure to challenge the jury array at the onset of the trial served to deprive him of a fair trial. The testimony at the *Ginther* hearing indicated that defendant's attorneys did not challenge the jury array because they were satisfied with the jury. Although there was testimony that defendant had informed his attorneys that he wanted more minorities on the panel, a difference of opinion between defendant and defense counsel on trial tactics does not constitute ineffective assistance of counsel. *People v Cicotte*, 133 Mich App 630, 637; 349 NW2d 167 (1984).

Defendant next asserts that he was denied his right to an impartial jury drawn from a fair cross section of the community. Defendant only attempted to show that this right was violated when moving for a new trial, and this issue was raised only in the context of a claim of ineffective assistance of counsel. Since this issue was not timely raised, and therefore not preserved for appeal, we will not consider it. See *Dixon*, *supra* at 404 (appellate review forfeited where challenge to array was not raised in a timely fashion and defendant failed to create factual record to support his untimely challenge).

Defendant next contends that the prosecutor's closing and rebuttal arguments deprived him of a fair trial. Questions of prosecutorial misconduct are decided on a case-by-case basis. *People v Marji*, 180 Mich App 525, 537; 447 NW2d 835 (1989). This Court examines the prosecutor's remarks in the context made to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

In the instant case, we note that defendant's appellate attorney expressly abandoned a claim that prosecutorial misconduct requires a new trial at the hearing on the motion for new trial. Where a party voluntary abandons an issue in the trial court, we need not address it. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979).

Since defendant also failed to object to the prosecutor's remark that a defense expert, Dr. Abramsky, "did not care if he was right or wrong because he gets paid to testify," appellate review is precluded unless the prejudicial effect could not have been cured by a cautionary instruction or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A prosecutor's attack on a defense expert's credibility can be grounds for reversal where there is no evidentiary support for the attack. *People v Chatfield*, 170 Mich App 831; 428 NW2d 788 (1988). In this case, Dr. Abramsky testified that he was paid to testify, so the prosecutor was not altogether precluded from raising this issue. However, in our judgment, the prosecutor would have acted far more responsibly had she not characterized the witness in this manner. We do not believe that it can fairly be said that a compensated expert witness, by virtue of that fact, does not "care if he was wrong or right." Nor are we aware of other evidence here that would suggest such a lack of integrity on the part of the expert witness, although we are cognizant of the deeply-felt disagreement on the prosecutor's part with the medical analysis of the expert. Nevertheless, despite our view that the prosecutor exercised questionable judgment in making this remark, we cannot, on this basis, conclude that defendant has suffered any miscarriage of justice.

Defendant's claim that the prosecutor disparaged Dr. Abramsky's qualifications by remarking, "Dr. Abramsky told you there is no training, he had no training in forensic psychology, and Dr. Shazer [the prosecutor's expert] has," similarly fails to demonstrate a miscarriage of justice. In context, the prosecutor was merely trying to distinguish the qualifications of the defense and prosecution experts. The prosecutor's remarks were supported by Dr. Abramsky's testimony that he cannot be certified as a forensic psychologist because he has not worked at the Forensic Center. Any misleading inference could have been corrected by a curative instructive. *Stanaway*, *supra* at 687.

Next, while defense counsel *did* object to the prosecutor's remark that Dr. Abramsky lied when he testified that defendant's conduct in stabbing his estranged wife was an episode of "catathymic violence," we note that the objection raised by defense counsel pertained to the prosecutor's use of the word "lied," and not to the prosecutor's ability to attack Dr. Abramsky's theory or credibility. We also note that the prosecutor's remark was supported by Dr. Shazer's testimony that the facts of this case would not constitute catathymic violence because defendant was able to articulate a motive for committing his act. The trial court overruled the defense objection, noting that it would be up to the jury to determine whether the witness is being honest or not. A prosecutor is free to comment on the

evidence and to draw all reasonable inferences therefrom. *Marji, supra* at 538. A prosecutor may also argue that a witness is not worthy of belief and is not constrained to argue inferences and conclusions only in the blandest terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Examining the challenged remark on whether the expert lied in context, we conclude that defendant has not demonstrated that the prosecutor's remark went so far as to deprive him of fair trial. *Bahoda, supra* at 267. However, again, we question the judgement of the prosecutor in offering such a characterization. We believe that the prosecutor could have have fully and effectively communicated her estimation of the expert's testimony without having resorted to the language used here.

We decline to consider defendant's last prosecutorial misconduct issue, that the prosecutor interjected her personal opinion on the evidence and defendant's guilt, because defendant did not object to the remarks. Also, even assuming that there was some impropriety in the remarks, the trial court's instructions to the jury that, "You must take the law as I give it to you. If a lawyer says something different than the law, follow what I say," were sufficient to dispel any prejudice. *Bahoda, supra* at 281. Moreover, we find that the prosecutor's unobjected-to remarks -- "I submit to you, ladies and gentleman, there is no other evidence that I could possibly give any jury on any 'assault with intent to murder' case . . .." -- do not amount to the type of personal vouching that demonstrates a miscarriage of justice and do not rise to a level requiring reversal. *Bahoda, supra* at 286-87.

Defendant next contends that he was deprived of his right to a fair trial and his right of confrontation because his interpreter failed to comply with her sworn oath to interpret Korean into English and English into Korean. We review constitutional issues de novo, but give deference to a trial court's findings when facts are in dispute. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). As a general rule, the duties of an interpreter are as follows:

> [T]he proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said. Although occasional lapses will not render a trial fundamentally unfair, adequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in English would be privy to hear. [Citation omitted.] [*People v Truong (After Remand)*, 218 Mich App 325, 333; 553 NW2d 692 (1996), quoting *People v Cunningham*, 215 Mich App 652, 654-655; 546 NW2d 715 (1996).]

A reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation. *United States v Joshi*, 896 F2d 1303, 1310 (CA 11, 1990). Moreover, the threshold issue of whether an interpreter is needed is a matter within the trial court's discretion, and a judge "is not under a duty to affirmatively establish a defendant's proficiency in the English language when no evidence is presented to him that could put the issue in doubt." *People v Atsilis*, 60 Mich App 738, 739; 231 NW2d 534 (1975).

In the case at bar, the record reveals that a relative of the defendant was used as an interpreter pursuant to a stipulation between the prosecution and the defense. When the trial court sua sponte informed the interpreter to translate what was being said, the interpreter replied that defendant told her that he was not interested in what was going on at that time, but would let her know if he needed assistance. The trial court then confirmed with both defendant and one of his attorneys that defendant understood what was going on, but had some difficulty speaking English. Neither defendant nor his attorneys objected to the interpreter's services. The trial court concluded that the bottom line was that defendant understood the English language to some degree and that it was left to the defense to advise the court if there was a problem.

Based on the record, we hold that defendant was not deprived his right of due process or his right of confrontation because he was reasonably able to understand the proceedings without the aid of an interpreter, was provided sufficient support relative to his difficulty in speaking English, and he made no timely objection on the record to the adequacy of the interpreter's services.

Finally, defendant argues that his sentence is disproportionate. The minimum sentence of fifteen years is presumptively proportionate because it is within the guideline minimum sentence range. *People v Broden*, 428 Mich 343. 354-355; 408 NW2d 789 (1987). Further, defendant has not presented any unusual circumstances that overcome the presumption of proportionality. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Although the trial court indicated that the seriousness of the offense could justify a minimum sentence beyond the guidelines, the trial court stated that it was staying within the guidelines in light of defendant's lack of prior record and the victim's comments at sentencing. We find that the trial court did not abuse its discretion in imposing the sentence. *People v Houston*, 448 Mich 312, 319-321; 532 NW2d 508 (1995).

Affirmed.

/s/ Stephen J. Markman
/s/ William B. Murphy
/s/ Janet T. Neff