

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE THOMAS,

Defendant-Appellant.

UNPUBLISHED

March 11, 2003

No. 234749

Berrien Circuit Court

LC No. 2000-402258-FC

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant Robert Lee Thomas of first-degree murder¹ in the stabbing death of an acquaintance, Gwenda Thompson. The trial court sentenced Thomas to life imprisonment without parole. Thomas appeals as of right. We affirm.

I. Basic Facts And Procedural History

Gwenda Thompson and Thomas met in September 1999 while working for L.B. Anderson's plumbing and sewage business in Benton Harbor. At that time, Gwenda Thompson was living with her children's father,² her son Keenan, her daughter Rashunda, and Rashunda's baby daughter. Thomas lived in a basement room of a house that belonged to his cousin, Charles Tunstall, and Charles Tunstall's daughter Mishannon, and two grandsons lived upstairs.

According to Rashunda Thompson, Thomas would call for her mother once or twice a week, although her mother did not consider him a boyfriend. Rashunda Thompson recalled driving her mother, who did not have a driver's license, to or from Charles Tunstall's house on three separate occasions, and Keenan Thompson would sometimes come to Charles Tunstall's house either alone or with his mother to play with Charles Tunstall's grandchildren. Rashunda Thompson explained that her mother had used crack cocaine on a daily basis for the past ten or fifteen years, and relied on friends, family, and odd jobs for money to support her habit.

¹ MCL 750.316.

² The father, who was not married to Gwenda Thompson, is not named in the trial transcripts.

Dwight Wilder, who also worked for L.B. Anderson, said that Thomas sometimes gave Gwenda Thompson money that he suspected she spent on crack. Wilder said that Thomas would always talk about Gwenda Thompson at work, telling Wilder that he “really liked her” and that he and Gwenda Thompson were physically intimate. However, Thomas was aware that Gwenda Thompson was seeing other men, and Thomas came to Wilder’s house twice to ask if Wilder was seeing Gwenda Thompson. Wilder responded that they were just friends. Thomas also suspected that Anderson was involved with Gwenda Thompson, which, together with complaints about the low pay, led Thomas to quit working for Anderson.

One day in April 2000, Thomas apparently picked Keenan Thompson up from school, brought him to the Tunstalls’ house, and told Gwenda Thompson that he would not bring Keenan Thompson back to her, but rather was going to bring him to the police station. Rashunda Thompson recalled her mother explaining that Thomas had done this “because he wanted some ass.” Gwenda Thompson called Charles Tunstall and told him that Thomas had tried to run her over and kill her, and demanded that Thomas return Keenan Thompson to her or she would call the police. At Charles Tunstall’s urging, Thomas did so. After this incident, Gwenda Thompson instructed Rashunda Thompson in no uncertain terms that if Thomas called their house again, she should hang up on him. Charles Tunstall reported that Thomas was angry that Gwenda Thompson no longer wanted to see him, and Thomas told Charles Tunstall that he was “going to put her to sleep.”

The last time Rashunda Thompson saw her mother alive was the afternoon of April 27, 2000. Gwenda Thompson had asked Rashunda Thompson to drive her to an area of town that was known for drugs. When Rashunda Thompson refused, Gwenda Thompson left the house on foot. Later that evening, according to nine-year-old Shakeer Tunstall, Gwenda Thompson and Thomas went together into Thomas’ room in the basement. At some point, Shakeer Tunstall saw Thomas come into the upstairs kitchen, take a knife from the “sharps drawer,” and return to the basement. Shakeer Tunstall described the knife as silver with a brown handle and approximately a foot long, and testified that a demonstration knife the prosecutor offered into evidence was similar to the one he had seen Thomas take. Shortly thereafter, Shakeer Tunstall heard the sounds of bumping against a wall and screaming, although his testimony was somewhat confused as to which sound came first. Shakeer Tunstall tried to tell his mother what he had heard, but when she told him she was sleeping, he waited until his grandfather returned from his fishing trip later that evening.

When Charles Tunstall returned to the house between 9:00 and 10:00 p.m., Shakeer Tunstall ran out of the house to tell him that Thomas and Gwenda Thompson had been fighting. Although Charles Tunstall did not go to the basement, his fishing companion went downstairs to retrieve some laundry, and reported that he had “hollered at” Thomas, who was in his room. After taking his companion home and cooking the fish, Charles Tunstall and Shakeer Tunstall went to sleep, and Mishannon Tunstall left for work.

Between 5:00 and 6:00 the next morning, Charles Tunstall was awakened by the sound of Mishannon Tunstall’s car, which he recognized by its loud muffler, leaving the driveway, and he heard it return approximately twenty minutes later. Charles Tunstall explained that Mishannon Tunstall allowed Thomas to use her car, a white Ford Escort, and that Thomas had the only set of keys. Charles Tunstall stayed in bed until 7:00 or 8:00, then rose to finish cleaning the fish he had caught the night before. At this time, he noticed that his sharpest butcher knife was missing.

That same morning, local resident Thomas Key noticed that a small, light-colored car was parked on Old East Main road as he went to work at approximately 6:00 a.m. Later that morning, Gwenda Thompson's body was discovered near this area, which was less than 1½ miles from the Tunstall residence. After an autopsy, forensic pathologist David Start concluded that Gwenda Thompson died from multiple sharp force injuries, of which there were at least thirty. Gwenda Thompson had been stabbed in the head, back, arms, and hands, and her throat had been slashed down to her spine. Start testified that the wounds were likely caused by a single-edged kitchen knife similar to the demonstration knife that was admitted into evidence, and took at least thirty seconds to inflict. Start characterized the hand wounds as "defensive type injuries" that were consistent with Gwenda Thompson attempting to grab the sharp edge of the weapon.

After police identified the body, they notified Rashunda Thompson, who gave the officers a list of her mother's acquaintances, including Thomas. Officer Daniel Diekema and a partner interviewed Thomas from 11:30 p.m. until 4:30 a.m. on May 1, 2000. Thomas waived his right to an attorney after Diekema read his Miranda rights. Diekema then explained that Gwenda Thompson's body had been found, and that this would be the subject of the interview. Thomas told Diekema that he had been seeing Gwenda Thompson for a few months, but had not seen her since April 21, 2000. Thomas reported being at home all evening on the night Gwenda Thompson was killed, and denied that he or anyone else had driven Mishannon Tunstall's car that night or the next morning. Thomas denied any involvement in Gwenda Thompson's death, and signed a consent form to allow the police to search his room and Mishannon Tunstall's car. Police conducted the search while the interview continued.

At some point, officers interrupted the interview to report that the search of Thomas' room had revealed blood. Thomas offered no explanation why there would be blood in his room. Diekema then noticed a small drop of what appeared to be blood on Thomas' boot, which Thomas also could not explain. Officers took Thomas' clothing into evidence, and also took samples from under his fingernails. Diekema noted that although there appeared to be some bright red blood under Thomas' fingernail, he had no cuts, bruises, marks, or scratches on his skin. Diekema took photographs to document Thomas' physical condition.

After Diekema concluded the interview, Officer Robert O'Brien told Thomas that the search revealed evidence of a struggle in his room. Thomas then admitted that Gwenda Thompson had been in his room on the night she died. Thomas told O'Brien that he loved Gwenda Thompson, but that he had loaned her thousands of dollars to support her crack habit. Thomas said Gwenda Thompson came to his house on the night in question because she knew he would be receiving a disability check. When the conversation turned to money, he said that Gwenda Thompson became crazy and struck him 20 to 25 times with her hand. According to Thomas, Gwenda Thompson had a knife with her. Thomas told O'Brien that there were a lot of things about the fight he couldn't remember, but he knew Gwenda Thompson had died during it. However, he denied knowing how her body got to the side of the road or what became of the knife, which was never found.

Thomas was charged with first-degree murder, and after a hearing, the court determined that he was competent to stand trial. Thomas filed motions to suppress the statements made during his police interview and to preclude the prosecution from introducing a similar knife as

demonstrative evidence; however, these motions were denied. The trial took place over three days starting March 20, 2001. Thomas did not testify.

During closing arguments, defense counsel referred to the demonstration knife as “the big lie,” asserting that the prosecutor’s purpose in introducing it was to inflame the jury’s emotions and to compensate for not having the actual murder weapon. Defense counsel then asserted that the “big myth is that Shakeer Tunstall saw my client take a knife from that knife drawer,” explaining that Shakeer Tunstall was a young man getting his moment of fame and attention, and asking the jury why he should be believed. In response, the prosecutor stated:

Catch how defense attorney used the word big a lot. It’s a big lie, big myth. That’s his spin or his characterization of our evidence, and I guess I would respond only by saying that I think defendant’s argument amounted to a big attempt to pull the wool over your eyes. A big attempt to get you to look at red herrings, things that are irrelevant or really just don’t matter.

* * *

But I think the conclusion that [defense counsel] wants you to draw from that because we don’t have the murder weapon is that maybe somehow a knife wasn’t used? But we know that’s not true. Some knife was used. Is the conclusion that he wants you to draw that maybe there was a knife but that defendant didn’t do it? That maybe Gwenda stabbed herself 30 times? We know that didn’t happen either. Again, that’s another big attempt to create an issue or to have you chase after a red herring that just doesn’t need to be chased after.

Thomas did not object to these statements.

After deliberations, the jury found defendant guilty of first-degree murder, and the trial court sentenced defendant to life imprisonment without parole.

II. No Duty To Retreat Instruction

Thomas argues that the trial court erred by failing to instruct the jury, sua sponte, that there is no legal duty to retreat from an attack in one’s own home. However, both Thomas and his attorney expressly approved the court’s proposed jury instructions, which did not include this instruction. Therefore, Thomas waived his right to challenge the instruction’s omission, and thereby extinguished any error.³

III. Prosecutorial Misconduct

A. Standard Of Review

Thomas next argues that the prosecutor improperly accused defense counsel of using misleading and diversionary tactics. Because Thomas did not object to the prosecutor’s

³ *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

comments at trial, this argument was not preserved.⁴ Therefore, our review is for plain error that was outcome determinative.⁵

B. Analysis

As Thomas correctly points out, a prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, because to do so implies that defense counsel does not believe his client, which undermines the presumption that the defendant is innocent.⁶ In this case, the prosecutor told the jury that “defendant’s argument amounted to a big attempt to pull the wool over your eyes. A big attempt to get you to look at red herrings, things that are irrelevant or really just don’t matter.” This statement, taken alone, does argue that defense counsel was attempting to mislead the jury.

However, when evaluating claims of prosecutorial misconduct, we consider the prosecutor’s comments in context, specifically taking defense counsel’s comments into account.⁷ If the prosecutor was merely responding to the defense counsel’s argument, “[a]n otherwise improper remark may not rise to an error requiring reversal.”⁸ In this case, the prosecutor’s comments were made in rebuttal to defense counsel’s closing argument, in which defense counsel characterized portions of the prosecutor’s evidence as “the big lie” and “the big myth.” This is factually similar to the alleged misconduct in *People v Watson*,⁹ in which the prosecutor told the jury that they “just had the whole boatload of red herrings” thrown at them, and that the defense strategy was to distract them so they would not pay attention to the evidence or the truth.¹⁰ However, because the comments were made in rebuttal of defense counsel’s suggestion that the prosecutor was not concerned about the truth, they did not constitute error requiring reversal.¹¹ Similarly, the contested comments in this case were a response to defense counsel’s characterization of the prosecutor’s evidence as a lie and a myth, and reversal is not required.¹²

Moreover, even if the prosecutor’s statement was error, it was not outcome determinative in light of the overwhelming evidence of Thomas’ guilt. A witness saw Thomas take a knife from the kitchen to the basement, and this knife was later discovered to be missing; Thomas admitted fighting with Gwenda Thompson in the basement; she had many defensive wounds and he had none; witnesses heard Thomas’ car leave for a twenty-minute interval in the early morning; and a witness saw a small white car like Thomas’ where Gwenda Thompson’s body

⁴ *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

⁵ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁶ *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988).

⁷ *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

⁸ *Id.*

⁹ 245 Mich App 572; 629 NW2d 411 (2001).

¹⁰ *Id.* at 592.

¹¹ *Id.* at 593.

¹² *Id.*

was found later that morning. Because any error resulting from the prosecutor's statements was harmless, reversal is not required.¹³

Affirmed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

¹³ *Carines, supra* at 763-764.