

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON ANDREW JACKSON,

Defendant-Appellant.

UNPUBLISHED

July 31, 2003

No. 233435

Kent Circuit Court

LC No. 00-005206-FC

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony-murder, MCL 750.316(1)(b), arising from his physical abuse and resulting death of his son. He appeals as of right, and we affirm.

The victim was born on August 4, 1997. On two occasions before September 2, 1997, the victim was left in defendant's care while the victim's mother, Holly Barteway, attended school. On both occasions, defendant physically abused the victim, but the abuse was not discovered. On September 2, 1997, Barteway asked defendant to take the victim overnight. Barteway was tired and wanted to rest. Defendant reluctantly agreed. While the victim was in defendant's care that night, he was severely abused.

When the victim was hospitalized the following morning, he was suffering repeated seizures and had difficulty breathing. He had obvious brain stem damage and suffered retinal hemorrhaging in both eyes. The injuries were related to shaken baby syndrome. A CT scan of the victim's brain revealed bleeding of two different ages. The older, milder brain injury occurred one to two weeks before the serious injuries sustained on the date in question. In addition to suffering severe physical injuries, the victim was also definitively, sexually abused. Sperm was found in the victim's mouth.

In late September 1997, the victim was released from the hospital and placed in the custody of foster parents. He required constant care. He suffered seizures, cried often, and was incapable of becoming comfortable. He was blind and deaf, and suffered from other severe deficits as well. He was expected to live less than one month. Amazingly, the victim survived

for more than two years before succumbing to his injuries. After the victim's death, defendant was charged with first-degree murder.¹

Defendant did not deny that he committed the atrocities against the victim. His defense was that he was mentally insane at the time of the crime. Extensive expert testimony was presented at trial. Defense expert, Dr. Stephen Miller, Ph.D., testified that defendant suffered from "dissociative disorder not otherwise specified" and that, as a result, he lacked substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. The prosecutor's expert, Dr. Mae Keller, disputed Dr. Miller's conclusions. She determined that defendant did not suffer from any dissociative disorder. She concluded that defendant had a personality disorder that did not constitute a mental illness.

The jury convicted defendant as charged. On appeal, defendant argues that he was denied a fair trial because of numerous instances of prosecutorial misconduct, and because the trial court improperly refused to instruct the jury on the offense of voluntary manslaughter.

I

Defendant claims that the prosecutor improperly argued and implied that Dr. Miller was testifying falsely for money, that Dr. Miller made his living by finding mental illnesses in criminal defendants, and that Dr. Keller, on the other hand, was credible because she was a salaried employee of the state. Because defendant failed to object to the questions and arguments that he now challenges on appeal, this issue is not preserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MRE 611(b) provides, in relevant part, that a "witness may be cross-examined on any matter relevant to any issue in the case, including credibility." A prosecutor may expose the bias or credibility of a defense witness through testimony that the witness is being compensated for testifying favorably for the defendant. See *People v Chatfield*, 170 Mich App 831, 833-835; 428 NW2d 788 (1988). A prosecutor may also impeach a defendant's expert witness by questioning his propensity to testify on behalf of criminal defendants on the issue of insanity. *People v Ross*, 145 Mich App 483, 489-490; 378 NW2d 517 (1985). Such testimony pertains to the credibility or bias of the expert witness. *Id.* In addition, a witness' bias or prejudice may be demonstrated by the use of extrinsic evidence. *People v Perkins*, 116 Mich App 624, 628; 323 NW2d 311 (1982). Where testimony is presented with respect to the payment of the expert witness, there is a basis for the prosecutor to argue that the witness is biased. *People v Williams*, 162 Mich App 542, 548-549; 414 NW2d 139 (1987). A prosecutor may also argue that her expert is an unbiased agent of the state, despite the inference that the defendant's expert is biased. *People v Miller*, 182 Mich App 482, 486; 453 NW2d 269 (1990).

Here, the prosecutor's questions, although tenacious and, at times, argumentative, were not improper. A prosecutor is permitted to expose a defense expert's bias or prejudice. MRE 611(b); *Chatfield, supra*; *Williams, supra*. We also disagree with defendant's claim that the

¹ Defendant was previously convicted of first-degree child abuse and criminal sexual conduct in connection with his actions. These convictions were affirmed by this Court. *People v Jackson*, 245 Mich App 17; 627 NW2d 11 (2001).

prosecutor's arguments were improper. The prosecutor never asked the jury to disregard Dr. Miller's testimony solely because he was paid for his testimony, advertised to criminal defense attorneys, and had a propensity to find insanity for criminal defendants. She also never argued that Dr. Miller was testifying falsely. Additionally, she did not ask the jury to accept Dr. Keller's testimony based solely on the fact that Dr. Keller was an unbiased agent of the state. Rather, the prosecutor focused her arguments on her interpretation of the evidence, including the prosecutor's view that that Dr. Miller's testimony failed to sufficiently support defendant's insanity defense. She also focused on Dr. Miller's bias and credibility.

This case is factually distinguishable from *People v Tyson*, 423 Mich 357; 377 NW2d 738 (1985), in which there was no record evidence to support the prosecutor's closing argument, which included statements that the defendant's expert was "paid to do this sort of thing" and was totally lacking in integrity. *Id.* at 373. In *Tyson*, the Court determined that the personal attack on the expert distracted the jury from the real issues and required the defendant to defend an issue that was not properly placed before the jury. *Id.* at 376. Unlike *Tyson*, here there is ample evidence to support the prosecutor's arguments. Further, defendant was able to counter the arguments during both his closing and rebuttal closing arguments. We find no plain error.

II

Defendant also says that the prosecutor misrepresented Dr. Miller's testimony during closing argument. Again, we review this unpreserved issue for plain error. *Aldrich, supra*.

In her closing argument, the prosecutor stated, on several occasions, that Dr. Miller had not concluded that defendant was legally insane. These arguments were misrepresentations or misinterpretations of the evidence. Dr. Miller's testimony appeared equivocal at times with respect to the central question of whether defendant could conform his behavior to the requirements of the law at the time of the crime. Further, again on the pivotal issue, Dr. Miller appeared to concede that defendant could appreciate the wrongfulness of his conduct. For that reason, the prosecutor could legitimately have argued that Dr. Miller's wavering or inconsistent testimony clearly did not support his ultimate conclusions. The prosecutor's argument was not so limited. She took the argument one step further and stated that Dr. Miller never concluded that defendant was insane. This overstated the matter: Indeed, on more than one occasion, Dr. Miller unequivocally testified that defendant met the definition of legal insanity. Thus, when the prosecutor used Dr. Miller's statements to emphatically argue that he never opined that defendant was legally insane, her argument was not supported by the record.

Though these statements were inappropriate, we find no plain error that requires reversal. A curative instruction could have cured any error with respect to the prosecutor's misinterpretation or misrepresentation of the record. Further, defendant's counsel fully addressed the prosecutor's arguments in his closing and rebuttal closing arguments. Also, the jury was instructed that the lawyers' arguments were not evidence and that the case could only be decided on the evidence. Jurors are, of course, presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under the circumstances, defendant cannot demonstrate that the prosecutor's improper arguments affected the outcome of trial. *Carines, supra*.

III

Also, defendant contends that the prosecutor improperly argued the “policeman at the elbow” standard when trying to convince the jury that defendant did not meet his burden of proof with respect to the insanity defense. Defendant also failed to object to this argument at trial and, therefore, the issue is unpreserved. Accordingly, we review the issue for plain error. *Aldrich, supra*.

In order to be adjudged criminally insane, a defendant must show that, as the result of a mental illness, he lacked substantial capacity either to appreciate the nature and quality of the wrongfulness of his conduct or to conform his conduct to the requirements of the law. MCL 768.21a. In *People v Jackson*, 245 Mich App 17, 19-23; 627 NW2d 11 (2001), this Court considered whether the “policeman at the elbow” standard may be considered in determining whether a defendant could conform his conduct to the requirements of the law.² In *Jackson*, which our Court decided after this case was tried, this Court decided that the “policeman at the elbow” hypothetical has only a limited bearing on a defendant’s capacity to conform to the requirements of the law. *Id.* at 21. It has some relevance if the hypothetical is approached as one avenue of inquiry. *Id.* The fact that someone could conform to the law if a policeman was present, however, is not conclusive proof with respect to the volitional aspect of the insanity test. *Id.* at 21-22. “Nonetheless, if it so chooses, the prosecution must be allowed to explore the depths of [a] defendant’s alleged incapacity by posing the ‘policeman at the elbow’ hypothetical because it is probative to some degree.” *Id.*

Here, the prosecutor argued that the “policeman at the elbow” test was the determining factor. It was clear from the context of her argument, however, that this was not the only fact on which she relied to argue that defendant could control his behavior and conform it to the requirements of the law. In her closing argument, the prosecutor primarily relied on defendant’s own words that he could control his conduct. Only after quoting defendant did the prosecutor argue the definition of legal insanity and discuss the “policeman at the elbow” hypothetical. Because the prosecutor relied on more than the hypothetical to conclude that defendant did not meet his burden of proof, we do not find that her argument constitutes plain error requiring reversal. *Id.* at 19-23. Importantly, the trial court properly instructed the jury on the burden of proof with respect to the insanity defense and instructed the jury that the lawyers’ arguments are not evidence.

In arguing that the prosecutor misrepresented the burden of proof necessary to prove an insanity defense, defendant says this prosecutorial assertion is improper:

He [Dr. Miller] admits reasonable minds would differ so that shows you he is not confident in his - - his - - it’s just as reasonable that it’s the other explanation is what he’s telling you. He’s saying its not a preponderance, it’s just as equal. Again, not making his burden.

² As the *Jackson* Court defined the standard, the “policeman at the elbow” hypothetical inquires, “would defendant have committed the crimes had there been a policeman at his elbow at the time[?]” *Jackson, supra* at 18.

Because defendant does not explain his position, and fails to cite any authority to support his assertion, we decline to address this issue and deem it abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

IV

Further, defendant avers that, on two occasions, the prosecutor created false impressions about the testimony of Dr. Rich, a psychiatrist who evaluated defendant at Pine Rest mental hospital. Defendant objected to both of the challenged arguments. The trial court struck the first argument from the record. The trial court issued a cautionary instruction after the second argument, but did not determine that the prosecutor's comment was improper.

“Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether a defendant was denied a fair trial by the prosecutor's conduct. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Our review of the record reveals that the prosecutor's first comment was unfair. She argued that she would have liked to hear from Dr. Rich. However, she previously agreed with defense counsel, outside of the jury's presence, that Dr. Rich had nothing to offer. Nevertheless, the trial court's act of striking the argument from the record was sufficient to cure any prejudice. The second challenged argument was offered by the prosecutor in rebuttal. Evaluated in light of the defense arguments and the evidence, we find that the prosecutor's rebuttal argument was fair comment designed to counter defendant's attempt to convince the jury that Dr. Rich's testimony confirmed Dr. Miller's diagnosis. Defendant implied that Dr. Rich was the “tie breaker” between the experts, yet chose not to call Dr. Rich. Considering the nature of the prosecutor's rebuttal comments, their responsiveness to defendant's argument, and the trial court's cautionary instruction, the comments did not deny defendant a fair trial. Moreover, again, the jury was instructed that the lawyers' arguments are not evidence.

V

Defendant additionally challenges the prosecutor's use of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) to question Dr. Keller about the possibility that defendant was malingering or feigning mental illness. One of the DSM factors to be considered, when determining whether a person is malingering, is the “medical/legal context of presentation.” The prosecutor asked Dr. Keller if she knew that defendant was referred to Dr. Miller by an attorney. After defense counsel objected, the trial court struck the question from the record.

On direct examination, Dr. Miller agreed that the DSM was like a bible. He referred to and used the DSM when diagnosing defendant. The prosecutor's questions with respect to whether defendant met the criteria for malingering under the DSM were, therefore, appropriate. Nevertheless, the questions were stricken from the record because the prosecutor agreed to strike them and the trial court, for the sake of expedience, decided that the referral process did not need to be addressed through Dr. Keller - it could be explained in a jury instruction. Later, the trial court instructed the jury with respect to defendant's right to assert an insanity defense and the process by which he was entitled to secure an independent psychiatric evaluation. Under the

circumstances, the prosecutor's question and reference to the DSM did not deny defendant a fair trial. *Green, supra*. Any perceived prejudice was cured by the jury instruction, which clarified the referral process. We further note that the jury was instructed that the lawyers' questions were not evidence and that, if something was stricken from the record, it could not be considered during deliberations.

VI

Defendant also argues that the prosecutor unfairly misrepresented the contents of a letter written by defendant. This issue is waived. At trial, the prosecutor implied that defendant wrote a letter to Barteway, in which he said that he would "beat the case" by using an insanity defense. Outside the presence of the jury, defense counsel disputed that the letter could be interpreted in such a manner. After reconsidering the letter, the prosecutor conceded that she had misinterpreted it. Defense counsel declined consideration of a mistrial and chose the remedy applied by the trial court. Waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver extinguishes any error. *Id.* Because defendant specifically agreed that the remedy employed at trial would obviate any consideration of a mistrial, we find that this issue has been waived. Thus, there is no error to review. *Id.* at 219.

VII

Further, defendant says that the cumulative effect of the prosecutor's misconduct in this case warrants reversal. The cumulative effect of several minor errors may warrant reversal in some cases even where individual errors would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller*, 211 Mich App 30; 535 NW2d 518 (1995). In order to reverse because of cumulative error, the effect of the errors must be sufficiently prejudicial to warrant a finding that the defendant was deprived of a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). Here, many of defendant's claims of prosecutorial misconduct have no merit and others could have been cured by a timely curative instruction upon request, or indeed were actually cured by either curative instructions or the court's final instructions. We find that the prosecutor's conduct as a whole did not seriously prejudice the outcome of the case such that reversal is warranted due to cumulative error.

VIII

Defendant also argues that counsel was ineffective for failing to object to several of the alleged instances of misconduct by the prosecutor. In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant's argument on appeal is cursory. He does not explain his position that, if trial counsel had objected to the challenged conduct, the outcome of the trial would have been altered.

We find that he has failed to meet his burden of demonstrating that, but for counsel's conduct, there was a reasonable probability that the outcome of the trial would have been different.

IX

Finally, defendant contends that the trial court improperly denied his request for an instruction on voluntary manslaughter. We disagree. In *People v Cornell*, 466 Mich 335, 353-355; 646 NW2d 127 (2002), our Supreme Court held that a jury may only consider necessarily included lesser offenses, not cognate lesser offenses. The decision in *Cornell* applies retroactively to all cases, as this one, that were pending on appeal when *Cornell* was decided and where the issue of a lesser offense was raised and preserved. *Id.* Voluntary manslaughter is not a necessarily included lesser offense of the crime of murder. *People v Pouncey*, 437 Mich 382, 387-388; 471 NW2d 346 (1991); *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). Therefore, defendant was not entitled to the requested instruction.

Affirmed.

/s/ Henry William Saad

/s/ Patrick M. Meter

/s/ Donald S. Owens