

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

GEORGE BUSH,

Defendant-Appellant.

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UNPUBLISHED

October 17, 2006

No. 260635

Wayne Circuit Court

LC No. 04-003870-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for releasing a harmful chemical substance (mercury) for an unlawful purpose, MCL 750.200i(1)(b). The trial court sentenced defendant to probation for five years. Defendant's conviction arises from a mercury spill that took place on October 11, 2001, at Finney High School in Detroit, where defendant was the chief engineer. Because sufficient evidence supported defendant's conviction; and the trial court did not err in denying defendant's motion for a mistrial, abuse its discretion in excluding challenged testimony, or violate defendant's right of confrontation in preventing him from cross-examining a witness concerning alleged psychiatric problems, we affirm.

Defendant first argues that there was insufficient evidence to support his conviction. The sufficiency of the evidence is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the charged crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991). The resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

MCL 750.200i provides, in pertinent part:

(1) A person shall not manufacture, deliver, possess, transport, place, use, or release any of the following for an unlawful purpose:

\* \* \*

(b) A harmful chemical substance . . . .

MCL 750.200h(e)(i) defines “[f]or an unlawful purpose” as, among other things, “having the intent to . . . [f]righten, . . . intimidate, threaten, [or] harass.”<sup>1</sup>

Defendant specifically argues that the evidence was insufficient to show that he either possessed or released the mercury that was discovered in the school on October 11. Viewed in the light most favorable to the prosecution, the evidence indicated that defendant was upset that Ronald Diebel, a high pressure boiler operator, was assigned to his crew to work as an engineer. Defendant believed that, although Diebel was licensed as a third-class engineer, this was a violation of the collective bargaining agreement. Defendant was further upset when, on October 11, 2001, Diebel was authorized to work overtime as an engineer. On October 11, 2001, defendant made several telephone calls threatening to close either the school or the plant if his boiler problems and personnel issues were not quickly resolved. This evidence was sufficient to support an inference that defendant had a motive to release the mercury because he was upset that the boiler and personnel issues were not resolved to his satisfaction.

The evidence also indicated that defendant had access to a supply of mercury before the spill. The school engaged in an effort to rid itself of mercury in July 2001. Supplies of mercury were collected and stored in a locked cabinet, awaiting disposal. There was evidence that defendant knew where the mercury was stored and how to open the cabinet without a key. Further, a barometer that had been listed in the mercury inventory was missing and, contrary to what defendant asserts, this was not the same barometer that remained in a classroom until 2004.

At approximately 12:55 p.m. on October 11, 2004, a large spill of mercury was discovered in the school’s science wing. Defendant was at lunch or inspecting the fan rooms immediately before the spill, and a jury could have found that he had the opportunity to release the mercury. The jury also reasonably could have determined that the spill was intentional, given the magnitude, spill pattern, and locations of the spills. There was also evidence that defendant seemed to know the locations of the spills throughout the hallway, even though the lighting was poor and others did not immediately notice mercury in the locations identified by defendant. Defendant was also observed kicking the mercury and playing with it, and did not seem to take its health dangers seriously. There was evidence that defendant’s clothing or shoes tested positive for mercury shortly after the spill, and that defendant subsequently laundered his clothes. Also, defendant showered twice shortly after the spill. The evidence concerning the nature of the spill, defendant’s familiarity with the locations of the spills, and defendant’s conduct in response to the spill, viewed in a light most favorable to the prosecution, was sufficient to support an inference that defendant intentionally released the mercury in the school.

In the days following the spill, defendant called several people to find out what they had told the police or to influence what they would say if contacted by the police. This evidence supported an inference that defendant was attempting to eliminate himself as a suspect responsible for the spill. The school’s security tapes were also discovered missing after the spill, and the evidence indicated that defendant was familiar with the security system and knew where

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<sup>1</sup> The statute also includes the intent to terrorize, injure, or kill, and the intent to damage or destroy property, but there is no claim that defendant acted with these other intents.

the cameras were located. The foregoing evidence, cumulatively considered and viewed in a light most favorable to the prosecution, was sufficient to support defendant's conviction beyond a reasonable doubt. *Petrella, supra* at 268-270.

Next, we address defendant's arguments, made through appellate counsel and in propria persona, that the trial court erred in denying his motion for a mistrial. Defendant argues that the prosecutor, intentionally and in bad faith, attempted to introduce inadmissible hearsay testimony that a certain bottle tested positive for mercury residue. Although the trial court ultimately struck the testimony and twice instructed the jury to disregard it, defendant argues that the testimony was unduly prejudicial and that a mistrial was required because the trial court's instructions could not cure the resulting prejudice. A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). The trial court also addressed this issue when denying defendant's motion for a new trial. A trial court's decision on a motion for a new trial is also reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998).

At trial, John Fowler, a chemist with the National Enforcement Investigation Center ("NEIC") of the federal Environmental Protection Agency, testified that mercury was detected in a bottle received by his office. On cross-examination, Fowler admitted that he did not personally conduct the testing, which instead was done by an unavailable employee. The trial court ultimately ruled that Fowler's testimony was based on inadmissible hearsay, ordered the testimony stricken, and instructed the jury to disregard any testimony concerning the bottle and the testing done on the bottle.

Defendant relies on *People v McDaniel*, 469 Mich 409, 410, 413; 670 NW2d 659 (2003), in support of his argument that the testimony concerning the testing of the bottle warranted a mistrial. In *McDaniel*, our Supreme Court held that a police laboratory report concerning the chemical analysis of a substance was hearsay and was not admissible under the public records exception to the hearsay rule. The Court reversed the defendant's conviction where a scientist who did not personally perform the chemical analysis was permitted to testify about the test results based on the inadmissible laboratory report. *Id.* at 410, 414. This case is clearly distinguishable from *McDaniel*. Here, after determining that Fowler did not personally conduct the testing of the bottle, the trial court agreed that Fowler's testimony concerning the test results was inadmissible. The court ordered the testimony stricken and twice instructed the jury, once during trial and again in its final instructions, to disregard any testimony concerning the bottle and the testing done on the bottle.

Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In this case, there is no basis for concluding that the jurors ignored the trial court's instructions to disregard the testimony about the bottle. On the contrary, in opposition to defendant's motion for a new trial, the prosecutor submitted the affidavit of the jury foreperson, who averred that the jury followed the court's instruction not to consider Fowler's testimony, and that the testimony was not considered in reaching a verdict. Defendant did not present any contrary evidence. And, we are not persuaded that Fowler's testimony was

so damaging that it was incapable of being cured by the court's cautionary instructions. The trial court instructed the parties, outside the jury's presence, not to make any further references to the bottle, and no evidence was ever presented linking the bottle to defendant. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial, or in denying defendant's motion for a new trial based on this issue.<sup>2</sup>

Defendant next argues that the trial court abused its discretion by excluding evidence that Ronald Diebel allegedly committed acts of misconduct when previously employed at Butzel Middle School. Defendant argues in particular that such evidence would have tended to show that Diebel was the person responsible for releasing the mercury at Finney High School. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary issues of admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 404(a)(4) provides that “[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . [e]vidence of the character of a witness, as provided in Rules 607, 608, and 609.”<sup>3</sup> Defendant sought to introduce evidence of Diebel's prior misconduct to show that he committed the charged conduct in this case. Such evidence is prohibited by MRE 404(a).<sup>4</sup>

Defendant argues that *Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973), affords him the right to introduce even speculative evidence that someone else may have committed the charged crime. In *Chambers*, however, there was evidence that someone else had *confessed* to the charged crime, but the defendant was precluded from examining that person as an adverse witness. *Id.* at 287-292. Additionally, the defendant was precluded from calling three witnesses who would have testified concerning what the alternate suspect had told them. *Id.* at 292-294. In the present case, there is no claim that Diebel confessed to this crime. Additionally, defendant was not denied the opportunity to cross-examine Diebel, to test his recollection, or to present noncharacter evidence to attempt to show that Diebel may have committed the crime. Unlike in *Chambers*, defendant never offered evidence that Diebel

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<sup>2</sup> At oral argument, defense counsel raised for the first time, a concern about information extended to the jury by the trial court itself during curative instructions to the jury regarding mercury testing on a bottle. This issue was not raised in defendant's brief on appeal. Nonetheless, we have reviewed the record and found no error. Defendant affirmatively expressed satisfaction with the jury instructions. An expression of satisfaction with respect to a trial court's jury instruction effects waiver of the issue. Once waived, there is no issue to review. *People v Carter*, 462 Mich 206, 214, 219; 612 NW2d 144 (2000).

<sup>3</sup> Defendant does not argue that the evidence was admissible under MRE 607, 608, or 609.

<sup>4</sup> The trial court also appeared to rely on MRE 403 as a basis for excluding the evidence. Evidence that might otherwise be admissible may be excluded under MRE 403 if the “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . .” Here, however, the evidence was plainly inadmissible under MRE 404(a). Therefore, any error in relying on MRE 403 was harmless.

released the mercury, he was merely seeking to introduce evidence of Diebel's alleged past misconduct to show that he may have acted accordingly on this occasion, contrary to MRE 404(a). Defendant was not deprived of a fair opportunity to defend himself by the mechanistic application of the rules of evidence. Thus, the trial court did not abuse its discretion in excluding the evidence of Diebel's alleged prior misconduct.

Finally, defendant argues that the trial court violated his right of confrontation by refusing to allow him to question a prosecution witness about her alleged mental illness. Constitutional questions are reviewed de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). Defendant relies on *Boggs v Collins*, 226 F3d 728, 731 (CA 6, 2000), but that case does not support his argument. In *Boggs*, the court recognized that the Confrontation Clause does *not* confer a right to impeach the general credibility of a witness. *Id.* at 736-738. Rather, it protects the accused's opportunity to engage in a particular attack on the witness's credibility, designed to reveal possible bias, prejudices, or ulterior motives. *Id.* Although the court agreed that a history of "mental illness can indeed be relevant to a witness' credibility," *id.* at 742, it observed "that the decision whether or not to allow in evidence of a witness's mental illness falls within the broad discretion of the trial court as they balance possible prejudice versus probative value." *Id.* Factors to consider include "the nature of the psychological problem, the temporal recency or remoteness of the condition, and whether the witness suffered from the condition at the time of the events to which she is to testify." *Id.*

In the present case, defendant failed to articulate a theory of how the witness's alleged mental illness tended to show that she was biased against defendant or in favor of the prosecutor, or gave her a motive to testify falsely against defendant. Similarly, no such theory is apparent from the record. Rather, it appeared that defendant sought to introduce evidence of the witness's alleged history of mental illness to wage a general attack on her credibility. The Confrontation Clause does not afford him that right.

Additionally, defendant failed to make a minimal showing that the witness was experiencing the effects of a mental illness that may have interfered with her ability to perceive or recall the events surrounding the offense. Compare *United States v Lindstrom*, 698 F2d 1154, 1161, 1163 (CA 11, 1983) (public sources and psychiatric records showed that the witness suffered from psychiatric disorders at the time of the events), and *Greene v Wainwright*, 634 F2d 272, 276 (CA 5, 1981) (the witness's alleged mental incapacity at the time of the crime was as relevant as an impairment of sight or hearing). Indeed, defendant did not even proffer evidence that the witness suffered from paranoia or schizophrenia at all—he merely claimed to "understand" that she had suffered from "psychiatric difficulties" at some unspecified point and had taken a leave of absence to seek treatment. Because defendant failed to make a minimum showing of relevance and probative value, see *Greene, supra* at 275, or show that his proposed

cross-examination of the witness was based on any facts relevant to the witness's credibility, his right of confrontation was not violated.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter  
/s/ Pat M. Donofrio