

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALBERT JARVI,

Defendant-Appellant.

UNPUBLISHED

October 26, 2006

No. 263852

Marquette Circuit Court

LC No. 03-040571-FH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree home invasion, MCL 750.110a(2). He was sentenced to 6 to 20 years in prison. We affirm.

Defendant first argues that the prosecutor engaged in a series of misconduct that deprived defendant of a fair trial. We disagree. Because defendant failed to preserve this issue by objections before the trial court, we shall review each claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant first contends that allegedly disparaging remarks about defendant's expert witness made during the prosecutor's closing argument were improper because there was no evidentiary support for such an attack on the expert's credibility. Specifically, defendant argues that it was improper for the prosecutor to argue that defendant's expert was not a qualified forensic examiner and that he always determined that the people he evaluated were legally insane.

"A prosecutor's attack on a defense expert's credibility is grounds for reversal where there is no evidentiary support for the attack." *People v Chatfield*, 170 Mich App 831, 834; 428 NW2d 788 (1988). However, a prosecutor may impeach a defendant's expert 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.*

After reviewing the prosecutor's remarks in context, see *Thomas, supra* at 454, we conclude that he did not improperly attack the defense expert's credibility. The prosecutor stated that he felt that defendant's expert was a credible and qualified psychologist, but noted that he was not a forensic examiner. This was supported by the record. Defendant's expert was qualified as an expert in the areas of psychology and neuropsychology, not forensic psychology. Further, he testified that he is a general clinician with diplomate status in forensic neuropsychology, and that, although he has provided expert testimony in approximately 50 or 60 cases during his 35 years of practice, only half of those involved forensic evaluations. Likewise, the record also supported the prosecutor's comments that defendant's expert had found all of his patients to be legally insane. Therefore, these comments were supported by the record.

Defendant also argues that the prosecutor improperly implied that defense counsel was trying to fool the jury by hiring the expert. However, defendant does not refer this Court to any particular remarks made by the prosecutor that would support such an implication. Therefore, defendant has abandoned this argument on appeal. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

Next, defendant argues that the prosecutor engaged in misconduct when he tried to use defendant's silence as substantive proof of defendant's sanity by introducing improper hearsay testimony from defendant's earlier competency evaluations. This misconduct, defendant argues, warrants reversal. We disagree.

At trial, the prosecutor called Dr. Ellen Garver, who was admitted as an expert in the area of forensic psychology. Garver testified that she examined defendant for the purpose of determining criminal responsibility. Before questioning Garver about her specific findings, the prosecutor asked Garver about the procedures that she followed in conducting the forensic evaluation of defendant. Garver discussed her general preparations for the examination and noted that she had reviewed the earlier competency evaluations. She explained that she also asked defendant to give an account of the offense. The prosecutor then asked, "what was his response?" Garver responded that defendant told her he could not remember what happened. The prosecutor then asked Garver whether defendant had been asked to give an account of the offense at the earlier competency examinations, to which she replied, "yes."

Q. And on the first occasion, what was his response?

A. . . . [H]e said he didn't want to provide one because he didn't want to compromise his legal situation.

Q. Didn't say, back in March, 2003, that he couldn't remember?

A. No, he didn't say that.

Q. And in the second report from the forensic center, was he asked the same question?

A. He was asked the same question.

Q. And his response then, that would have been approximately a year later?

A. May of 2004. His response then was that he couldn't recall what happened.

Q. So between March of 2003 and May of 2004, his position changed from, "I'm not going to tell you because I don't want to compromise my situation," to "I don't remember"?

A. That's correct. He was inconsistent with what he said about it. The first time, he said, when he was asked: If your attorney asks you about it, can you talk with him about it? And he indicated that he could.

Q. And when you asked him about the offense, he said he couldn't remember?

A. That's correct.

Defendant's trial counsel did not object to this testimony and no further testimony on the subject was elicited by either party.

Our Supreme Court has held that it is a violation of due process to use a defendant's silence at the time of arrest and after receiving the warnings required under *Miranda v Arizona*, 384 US 436; 865 S Ct 1602; 16 L Ed 2d 694 (1966) for impeachment purposes. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001). This is because silence may simply reflect an exercise of the defendant's *Miranda* rights and because *Miranda* rights carry an implicit assurance that silence in reliance on those warnings will not be penalized. *Id.*, citing *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Although the holding in *Doyle* applied to a situation where the prosecution attempted to use the defendant's silence as evidence of guilt, the United States Supreme Court has extended the rule to encompass use of silence to impeach a defendant's insanity defense. *Wainwright v Greenfield*, 474 US 284; 106 S Ct 634; 88 L Ed 2d 623 (1986); see also *People v Belanger*, 454 Mich 571, 577-578; 563 NW2d 665 (1997). The Court in *Wainwright* explained that it found,

... no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations. [*Wainwright, supra* at 292.]

On appeal, defendant contends that the prosecutor's questioning of Garver concerning defendant's earlier refusal to offer an account of the offense violated the rule stated in *Wainwright* and that this violation warrants reversal. Although it is not entirely clear that the allegedly erroneous questioning implicated defendant's unambiguously asserted right to remain silent, see *People v Spencer*, 154 Mich App 6, 13; 397 NW2d 525 (1986), we conclude that, even if the questioning constituted plain error under the rule stated in *Wainwright*, the error did not affect the outcome of the trial.

In the present case, both the prosecution and defendant presented expert testimony on defendant's mental condition at the time the offense was committed. The experts testified over the course of an entire day and the testimony largely focused on defendant's extensive mental health history, defendant's actions on the day he was arrested and on the various tests and evaluations performed by the experts. Relative to this testimony, the statements concerning defendant's initial refusal to describe the offense occupied only a small portion of the total expert testimony and was not particularly emphasized. Furthermore, at no point in the prosecution's closing statements did he refer to this testimony or argue that the jury could infer from defendant's initial refusal to describe the event as substantive evidence of his sanity. Therefore, the jury was likely not particularly affected by this testimony.

In contrast, the prosecutor presented an effective cross-examination of defendant's expert witness, which undermined the witness' assessment of defendant's sanity. Likewise, plaintiff's expert presented compelling evidence that defendant's mental health problems did not rise to the level of a mental illness.¹ Finally, the jury heard testimony that defendant forced entry into the victim's home at a time when he thought no one would be home, took steps to conceal his identity, attempted to hide when the homeowner returned home unexpectedly, fled the scene after his discovery and eventually barricaded himself in his home. This evidence is compelling proof that any mental illness defendant may have had did not constitute legal insanity. For these reasons, we cannot conclude that the allegedly erroneously admitted testimony affected the outcome of defendant's trial. Consequently, even if the admission of this testimony constituted plain error, it would not warrant relief. *Carines, supra* at 763.

Because we have concluded that this testimony did not prejudice defendant, we must also reject defendant's claims that the admission of this testimony warrants reversal on the separate grounds that the testimony was improperly admitted hearsay or violated defendant's right to confront the witness against him.

Finally, defendant also argues that the prosecutor engaged in misconduct when he elicited testimony from police officers that portrayed defendant as a "danger to the community." Specifically, defendant contends that the officers' testimony was improper other acts evidence admitted in contravention of MRE 404(b). After reviewing the testimony, we conclude that the prosecutor did not improperly introduce other acts evidence.

MRE 404(b)(1) provides,

¹ See MCL 768.21a.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court adopted the approach to other acts evidence enunciated by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a “determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.” *VanderVliet, supra* at 75, quoting advisory committee notes to FRE 404(b). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*Id.* at 55-56.]

First, we note that one of the instances cited by defendant involved testimony introduced by defendant on cross-examination. Hence, it cannot constitute prosecutorial misconduct. Further, the remaining testimony was not introduced for the improper purpose of showing defendant’s criminal propensity. Rather, it was used to explain the circumstances surrounding defendant’s arrest and the reason that the police were concerned about their safety and that of the public during the stand-off with defendant. Finally, the probative worth of the testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403. Consequently, the admission of this evidence was not plain error.

There were no prosecutorial errors warranting reversal.

Defendant also argues that his trial counsel made several errors that constitute ineffective assistance of counsel. Specifically, defendant argues that his trial counsel: (1) failed to present the testimony of the doctor who diagnosed defendant as mentally ill immediately after the offense; (2) failed to request a preliminary jury instruction on mental illness, insanity, and criminal responsibility, as required by statute; and (3) failed to object at trial to at least three instances of prosecutorial misconduct. We do not agree that defendant’s trial counsel was constitutionally ineffective. The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The factual findings are reviewed for clear error, and the matters of law are reviewed de novo. *Id.*

To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel’s performance fell below an objective standard of reasonableness

under prevailing professional norms and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second part of the test, defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id.* at 6. "[D]efendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). Further, a reviewing court will not assess trial counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defense counsel's failure to call the doctor as a witness is presumed to be a matter of trial strategy, which will only constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense, i.e., a defense that would have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, defendant has failed to show how the doctor's testimony would have changed the outcome of his case where the information about defendant's mental-health treatment and the doctor's diagnosis of mental illness immediately after the incident was presented to the jury through the testimony of defendant's expert witness and the prosecution's expert witness, who both testified about defendant's hospitalization.

Defendant also argues that defense counsel should have requested a preliminary jury instruction on the concepts of mental illness, insanity, and criminal responsibility, as required by statute. MCL 768.29a(1) provides as follows:

If the defendant asserts a defense of insanity in a criminal action which is tried before a jury, the judge shall, before testimony is presented on that issue, instruct the jury on the law as contained in sections 400a and 500(g) of Act No. 258 of the Public Acts of 1974 and in section 21a of chapter 8 of this act.

Thus, when an insanity defense is presented, the trial court must give preliminary instructions to the jury on the definitions of mental illness, mental retardation, and legal insanity. *People v Grant*, 445 Mich 535, 541-542; 520 NW2d 123 (1994). The failure to give such an instruction is error regardless of a defendant's failure to request them. *Id.* at 542-543. Hence, defendant's trial counsel should not have needed to request the instructions. Further, even were we to conclude that defendant's trial counsel's failure to bring this error to the attention of the trial court constituted performance that fell below an objective standard of reasonableness under prevailing professional norms, defendant has not shown that this failure was outcome determinative. Both the prosecution and defense counsel raised the issue of insanity during voir dire. Both defendant's expert and the prosecution's expert explained the definition of legal insanity during their testimony. The trial court also clearly instructed the jury on insanity after the close of proofs. Therefore, we cannot conclude that counsel's failure to request the instruction was outcome determinative.

Finally, as noted above, there were no instances of prosecutorial misconduct that affected the outcome of defendant's trial. Hence, defendant's trial counsel's failure to object to the

claimed instances of misconduct could not have affected the outcome of the trial. Therefore, any errors do not warrant relief.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski