STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID NORVELL CHURCHILL,

Defendant-Appellee.

UNPUBLISHED
April 22, 1997

No. 189648
Oakland Circuit Court
LC No. 91-113194

ON REMAND

Before: MacKenzie, P.J., and Jansen and T.R. Thomas*, JJ.

PER CURIAM.

Following a jury trial in the Oakland Circuit Court, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and was sentenced to the mandatory term of life imprisonment without the possibility of parole. After the conviction, defendant moved for a new trial based on prosecutorial misconduct. The trial court granted defendant's motion and ordered a new trial, finding that defendant had been denied a fair trial. This Court denied the prosecution's application for leave to appeal in an unpublished order dated May 26, 1995 (Docket No. 184602). The prosecution then appealed to our Supreme Court, which remanded the case to this Court "for consideration as on leave granted." *People v Churchill*, 450 Mich 875 (1995).[1]

I

This case arises out of the killing of defendant's girlfriend, Bonnie Jo Wolf. The incident occurred on August 20, 1991. In the weeks preceding the victim's death, the relationship between defendant and the victim deteriorated, as the two were arguing frequently and using cocaine often. During the evening of August 19, 1991, defendant and the victim used cocaine until about 6:00 a.m. Defendant then left the victim's house to go to sleep. When he returned, he found the victim still using cocaine and an argument ensued. The argument continued into the afternoon of August 20, 1991, and the two used cocaine intermittently throughout the day. At one point during the argument, the victim

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* Circuit judge, sitting on the Court of Appeals by assignment.

burned defendant with the pipe they were using to smoke cocaine. The victim then left her house, and later returned at 2:45 p.m.

Upon the return to her house, the victim again began smoking cocaine. Defendant consumed two or three drinks of alcohol. The two continued to argue, and the victim eventually grabbed and slapped defendant. The two fought physically and defendant admitted to choking the victim, as well as hitting her with a bar of soap and a toy rifle. Defendant choked the victim with his left hand, she fell back onto the bed, and her breathing was ragged. Defendant claimed that when he left the scene of the altercation, he did not know that the victim was dead. The following day, defendant was taken to the police station for interrogation. Following defendant's repeated inquiries regarding the victim's status, the police stated that "she is not doing real well," but the police did not tell defendant that the victim had died. At the police station, defendant admitted to hitting the victim several times, and stated that the episode was "equivalent of a premeditated assault, it must have been." Upon being informed that the victim had died, defendant began crying and would answer no more questions. The cause of death was strangulation and blunt-impact head injury.

Defendant was charged with Wolf's killing, and a jury trial began on July 13, 1992. Defendant's defense was self-defense, and that he did not have the intent to kill the victim. The trial lasted twelve days and concluded on July 30, 1992, with defendant's conviction of first-degree murder. Defendant was sentenced on February 11, 1993, to the mandatory term of life imprisonment without the possibility of parole. On March 25, 1993, defendant moved for a directed verdict of acquittal, or for a new trial based on prosecutorial misconduct. The trial court, in an opinion and order dated March 15, 1995, denied the motion for directed verdict, finding that there was sufficient evidence presented to sustain defendant's conviction of first-degree murder.[2] The trial court, however, granted the motion for a new trial, finding instances of prosecutorial misconduct which denied defendant a fair trial. The prosecution now appeals this decision.

II

In the motion for new trial, defendant contended that the prosecutor acted impermissibly by: (1) repeatedly telling the jury that the trial court had found defendant's confession to be knowing, voluntary, and intelligent; (2) denigrating defense counsel and defendant; (3) questioning defendant's lack of corroborating evidence, thus shifting the burden of proof; and (4) appealing to the jury's sympathy and sense of civic duty. The trial court found the first two allegations of prosecutorial misconduct to have merit, and found that defendant was denied a fair trial.

A

We review the trial court's decision regarding a motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). In reviewing claims of prosecutorial misconduct, this Court must examine the remarks made in context to determine whether they denied the defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

B

The prosecution first asserts that the trial court abused its discretion in granting defendant a new trial based on the prosecutor's references to defendant's *Walker*[3] hearing. Before trial, defendant requested a *Walker* hearing to determine whether his confession was involuntary or given under diminished capacity. The trial court found that defendant's confession was admissible. During jury voir dire, the prosecutor made the following comments regarding the *Walker* hearing:

> [The judge] found [the police statement] to be a very legal, voluntarily [sic] knowing statement.
>
> * * *
>
> The judge has ruled that there's absolutely nothing wrong with the statements that were taken.
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> * * *
>
> [D]o you [know] what a Walker Hearing is? . . . That's a hearing where the Judge determines if the statements that were taken by a Defendant were knowing, voluntarily [sic] and informed. And this Judge determined based upon lengthy briefs involving the law, that these officers did nothing wrong. They didn't have a duty to disclose anything to the Defendant. All they had to do was advise him of his rights.

In examining a police officer at trial, the prosecutor also solicited the following testimony regarding the *Walker* hearing:

> *Q.* [*By Prosecutor Cabadas*]: What's a Walker Hearing?
>
> *A.* [*By Sergeant Rollinger*]: That's a hearing where the Judge has to make a ruling whether or not a confession that police officers obtained from a Defendant was obtained legally.
>
> *Q.* Knowing, voluntarily. That's why I went through the foundation about did you beat him, did you threaten him, did you pull guns out, wasn't it a nice room, was everything wonderful, did he have coffee, was he lucid; those sort of things. That's the basis for a Walker Hearing, right?
>
> *A.* Yes.
>
> *Q.* That's a legal question that's resolved by the Judge not the jury, right?
>
> *A.* Yes.
>
> * * *

Q. In the course of those two days, was it brought up that the Defendant--didn't he allege initially that he was denied a knowing and voluntary waiver and he was basically deprived of his constitutional rights and that the jury shouldn't hear his statements? Wasn't that alleged?

A. Well, that was the purpose of the Walker Hearing.

Q. And the Judge ruled what?

A. That the confession that was obtained was proper.

Later, during his cross-examination of defendant, the prosecutor again inquired concerning the *Walker* hearing. The following occurred:

Q. [By the prosecutor] At that point and time, you alleged that the police – first off that you were under cocaine frenzy and therefore you shouldn't have been – you were in no mental state to make the statements that you did, right? That was one of your arguments?

A. [By defendant] That's correct.

Q. Therefore the jury shouldn't hear those statements, right?

A. That's correct.

* * *

Q. What if I told you in the entirety of that Walker Hearing you never once mentioned anything about drinking, [l]et alone two drinks?

* * *

Q. Why then when it came time for the Walker Hearing to try to run this diminished capacity defense did you testify that I still felt the effects the night before based on my alcohol and narcotics consumption? Why then if you said one thing to the officers do you then some months try to run by the Judge a different version?

* * *

Q. Okay. So there's problems. So at 10:25 at night what you're trying to tell the Judge back in March 27th of this year was, I was diminished and I shouldn't have given the statement, yet you don't bring this up in your interview, but some six hours earlier, ten hours earlier you climb through a six to seven-foot high bathroom window in an effort to break and enter your ex-wife's house to get into the bathroom. You weren't that diminished in your capacity, were you now?

* * *

Q. Well, you were – this Walker Hearing focuses right on your alleged diminished capacity. Where in the course of the Walker Hearing did you testify to consuming a half a bottle of Vodka or less on 8/20?

Finally, during closing argument, the prosecutor made the following comments:

> So when he gets in a Walker Hearing, he tries to run a diminished capacity defense by them, and as you all had the opportunity to see, he can be a little slippery. He likes to talk a lot, but he doesn't like to answer any questions. He likes to give you all a lot of self serving comments on his part. And what does he tell? When I get him on the stand and I finally pin him down, he's actually said I had some occasional coke, if you believe a word of that, in the morning. From one to three, I didn't have anything. From three to six we might have done some more. Maybe one and a half to two, but then I point out to him in his own Walker Hearing testimony, 64, when I asked him specifically hour by hour, day by day, I have no real recollection, Mr. Cabadas at that point in time.
>
> Alcohol. First off, in the Walker Hearing, I asked him any reference to alcohol. I don't know, I don't remember. Then counsel, and I thanked her for that, points out, well you did mention alcohol, didn't you? He said, yeah, he said the day before, this is 8/21 . . . the Judge is trying to get a straight answer out of him, and said when is this, what did you do . . . I had alcohol. Well what about the even[ing] preceding that? Oh no alcohol, but drugs. He told you under oath that after 5:30 on 8/20 until seven o'clock the following morning he had this mysterious blackout from his own diminished capacity. Yet on the Walker Hearing, he tells the Judge the evening preceding . . just drugs that evening.

We first note that defendant did not object to any of the prosecutor's references to the *Walker* hearing at trial. Appellate review of allegedly improper prosecutorial remarks is generally precluded absent objection. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

The purpose of a *Walker* hearing is to determine the admissibility of a confession. *People v Gilbert*, 55 Mich App 168, 172; 222 NW2d 305 (1974). A finding that the confession was admissible merely puts the confession on equal footing with all other properly admitted evidence. *Id.*, pp 172-173. After such evidence has been admitted, the jury may be informed that they should determine, on the basis of all the relevant evidence, (1) if the confession was made and (2) if they so find, they should decide if the statement is true. *Id.*, p 173. This Court in *Gilbert, supra,* p 173, went on to state:

> The trial court should not, as happened in this case, go on to discuss anything more. For to inform the jury of the existence, nature, and results of a *Walker* hearing

> not only makes it unlikely that the jury will thereafter decide the confession was never made, . . . but it also tends to unfairly discount the credibility of defendant's impeaching evidence, especially that properly admitted evidence that relates to voluntariness. The trial court thus would improperly impinge upon the province of the jury.

In following *Gilbert*, this Court has continued to hold that it is error requiring reversal for a trial court to inform the jury that the defendant's statement has been found to be voluntary in a pretrial *Walker* hearing. *People v Kincaid*, 136 Mich App 209, 215; 356 NW2d 4 (1984); *People v Corbett*, 97 Mich App 438, 443; 296 NW2d 64 (1980); *People v Mathis (On Remand)*, 75 Mich App 320, 324; 255 NW2d 214 (1977); *People v Skowronski*, 61 Mich App 71, 77-78; 232 NW2d 306 (1975). The prosecutor should not have told the jury during voir dire that the trial court had found defendant's statement to be voluntary, nor should the prosecutor have mentioned during his examination of the police officer that the statement was voluntary and obtained legally.

However, we note that defendant failed to object to the prosecutor's statements at that time, and had he done so the trial court could have given a limiting instruction to the jury. We further note that those potential jurors who stated that they had concerns with the police actions or that they could not fairly listen to the statement were all excused. Moreover, the trial court instructed the jury that the lawyers' statements, arguments, and questions to the witnesses were not evidence, and that its comments, rulings, questions, and instructions were not evidence, thereby helping to dispel any prejudice. See *Bahoda, supra*, p 281. Also, we note that the trial court properly instructed the jury in the following manner with respect to the confession:

> The Prosecution has introduced evidence of a statement that it claims the Defendant made. During voir dire, I stated to you that I had ruled after the Walker Hearing that the Defendant's statement to the police was voluntary. What I should have said was that I ruled the statement was admissible. You cannot consider such an out-of-court statement as evidence against the Defendant unless you do the following.
>
> First, you must find that the Defendant actually made the statement as it is given to you. If you find that the Defendant did not make the statement at all, you should not consider it. If you find that he did make the statement, you may consider that part as evidence.
>
> Second, if you find that the Defendant did make the statement, you must decide whether the whole statement or part of it is true. When you think about whether the statement is true, you should consider how and when the statement was made as well as all the other evidence in the case.
>
> You may give the statement whatever importance you think it deserves. You may decide that it is very important or not very important at all. In deciding this, you should once again think about how and when the statement was made, and about all the other evidence in the case.

This instruction to the jury was accurate and clearly dispelled any prejudicial effect of the prosecutor's remarks concerning the *Walker* hearing.

Other than the brief and isolated remarks made by the prosecutor concerning the fact that the trial court found defendant's statement to be voluntary, we find no error with respect to the remaining remarks made by the prosecutor during his cross-examination of defendant and during closing argument. The prosecutor was merely arguing to the jury that defendant's claim of diminished capacity while giving the statement should not be believed and we find nothing improper in the prosecutor's remarks in this regard.

Accordingly, because defendant did not object to the prosecutor's remarks, because the potential jurors who expressed concern with the police conduct during defendant's statement were excused, because the trial court properly instructed the jury regarding the statement at the close of trial, and because there was sufficient evidence to sustain defendant's conviction, we find no reversible error with respect to the prosecutor's limited remarks that defendant's statement was found to be voluntary. *Kincaid, supra,* p 216. Defendant was not denied a fair trial in this regard and the trial court's finding to the contrary is reversed.

C

The trial court also found that the prosecutor made impermissibly inflammatory comments denigrating the defense.

At trial, the prosecutor referred to comments by defendant as "this perjured testimony of yours." In addition, the prosecutor argued that defendant's attorney and defendant's expert witness "were trying to bamboozle" the jury. Defendant also claimed that the following statement of the prosecutor impermissibly denigrated the defense counsel:

> Well, the first time [defendant's ex-wife] testified that was what she first testified. After a break and an opportunity to speak with counsel, there was a variation on that testimony.

In his motion for a new trial, defendant contended that such statement by the prosecutor implied that defendant's attorney solicited perjured testimony from the witness.

While a prosecutor may suggest that defendant or a witness is lying, the prosecutor may not question defense counsel's veracity. *People v Dalessandro,* 165 Mich App 569, 580; 419 NW2d 609 (1988). When a prosecutor argues that the defense counsel is intentionally trying to mislead the jury, the prosecutor is in effect stating that defense counsel does not believe his own client. *Dalessandro, supra,* p 580. Such an argument undermines a defendant's presumption of innocence. *Id.* However, prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Bahoda, supra,* p 282.

We do not find that the above comments by the prosecutor suggested that defense counsel was intentionally trying to mislead the jury, nor did the prosecutor question defense counsel's veracity. Further, we do not agree with defendant's characterization that the prosecutor was suggesting that defense counsel intentionally solicited perjured testimony from a witness. Moreover, it is permissible for a prosecutor to suggest that the defendant or a witness is lying. *Dalessandro, supra*, p 580. Further, we note that defendant did not object to these remarks, and the trial court instructed the jury that the lawyers' questions, statements, and arguments were not evidence to be considered. We find nothing improper in the prosecutor's statements and defendant was not denied a fair in this regard.

Defendant also contended, and the trial court agreed, that the prosecutor made other improper, inflammatory remarks regarding uncharged bad conduct of defendant's. Specifically, defendant claimed that the prosecutor impermissibly suggested that defendant had previously stolen from the victim, that defendant could not be trusted with the victim's car, that defendant had broken into the victim's house, that the prosecutor attempted to elicit testimony of an expunged controlled substances conviction, that defendant would not get a job, that defendant attempted to fabricate a defense, that defendant's reaction to a picture of the victim was fabricated, that defendant would attempt to engender sympathy from his nine-year-old son, and that the prosecutor improperly admonished defendant to not lose his temper while he was testifying.

First, defendant did not object to any of these comments, except regarding the attempt to elicit testimony of defendant's prior criminal record and showing the photograph of the victim to defendant. The trial court sustained defendant's two objections, thereby curing any error. Because defendant sought relief in the trial court and obtained it, he is without further remedy in this Court.

With respect to the other comments and questions of the prosecutor that were not objected to, we find no reversible error. We do not find that the prosecutor's remarks, taken in their proper context, were intentionally injected into the trial with no apparent justification except to arouse prejudice. *Bahoda, supra*, p 266; *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). Much of the comments surrounding defendant's "bad acts" were actually relevant to the trial regarding defendant's intent and motive for the killing. This is not a situation where defendant denied killing the victim. The issue to be determined by the jury was defendant's state of mind at the time of the killing. Therefore, the relationship between the parties was relevant in establishing defendant's state of mind and in proving the elements of first-degree premeditated murder. See *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Additionally, had defense counsel objected to any of the remarks now complained of on appeal, the trial court could have given a curative instruction as it did with the comments that were objected to.

Accordingly, our review of the lower court record does not indicate that the prosecutor intentionally injected inflammatory remarks into the trial with no apparent justification except to arouse prejudice. Therefore, there is no reversible error in this regard and defendant was not denied a fair trial.

D

In the motion for new trial, defendant next contended that the prosecutor impermissibly shifted the burden of proof by eliciting testimony that defendant had not submitted to blood testing and that defendant had not presented an expert witness on the claim of diminished capacity. Defendant did not object to these remarks at trial. The trial court ruled that this claim would not normally mandate a new trial absent timely objections, but that all of the remarks taken together served to deny defendant a fair trial.

We find no reversible error with respect to this claim of prosecutorial misconduct. Defendant did not object to these comments and the trial court's instructions dispelled any prejudice to defendant. The trial court specifically instructed the jury that the lawyers' statements, arguments, and questions to the witnesses were not evidence. The trial court also instructed the jury that defendant was not required to prove his innocence or do anything. In reviewing the prosecutor's comments in this regard, there was no impermissible burden shifting. See, e.g., *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995).

E

As his final issue of prosecutorial misconduct, defendant claimed in his motion for new trial that the prosecutor improperly appealed to juror sympathy and made a civic duty argument. Specifically, the prosecutor questioned witnesses "on behalf of the jury." Further, the prosecutor made the following comments at closing argument:

> And foremost, although it's obviously futile, I want to thank you on behalf of the victim in this matter. The victim has remained voiceless throughout this, and regrettably has also remained faceless throughout this, but I think it's important for all of us to recognize, we're talking about a human being. She's not here and the reasons she's not here are the reasons we're here today.
>
> * * *
>
> I'm not asking for it as a personal favor from any of you to me. I'm asking for this verdict for them. There are people right there that were robbed. Not me, not you, the community in a sense, yes, has been robbed of a human being, but there are the people that have been robbed right there.

Defendant did not object to any of these remarks at trial. The trial court ruled that these alleged improper remarks would not normally mandate a new trial absent a timely objection. However, in light of the other alleged improper remarks, the trial court concluded that defendant was denied a fair trial.

Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members. *Bahoda, supra,* p 282. In reviewing the prosecutor's remarks made in context, we do not believe that the prosecutor was injecting issues broader than guilt or innocence into the trial. *Id.,* p 284. Moreover, to the extent that the remarks can be considered to be improper, they were adequately cured by the trial court's instruction to the jury that the arguments of the lawyers were not evidence. *People v Stimage,* 202 Mich App 28, 30; 507 NW2d 778 (1993).

Accordingly, we do not find that the prosecutor's conduct in this case denied defendant a fair trial. The trial court's order granting defendant a new trial on the basis of prosecutorial misconduct is reversed.

Reversed.

/s/ Barbara B. MacKenzie
/s/ Kathleen Jansen
/s/ Terrence R. Thomas

[1] The Supreme Court also cited the case of *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995), without further instruction.

[2] Neither of the parties challenge the trial court's denial of the motion for directed verdict of acquittal in this appeal.

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).