STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS THOMAS STOKES,

Defendant-Appellant.

UNPUBLISHED
July 16, 1999

No. 202404
Oakland Circuit Court
LC No. 96-149322 FC

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant was convicted by jury of assault with intent to murder, MCL 750.83; MSA 28.278, and was sentenced to fifteen to thirty years' imprisonment. He appeals as of right and we affirm.

Defendant first argues that he was denied his rights to due process and the effective assistance of counsel when the prosecution repeatedly introduced into evidence the hearsay opinions of three witnesses that they initially assumed that it was defendant who had assaulted his mother. We disagree. The admission of evidence is within the sound discretion of the trial court and will not be reversed on appeal unless there is a clear abuse of that discretion. *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). With regard to ineffective assistance of counsel, under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant has the burden of overcoming the presumption that the challenged conduct was sound trial strategy. *Id.* The deficiency must have prejudiced the defendant. *Id.*. A defendant must demonstrate that, but for the counsel's errors, there is a reasonable probability that the result of the trial would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

The victim initially told officers that she was "99 percent sure" it was defendant who attacked her. Her neighbors, Charles Williams and Marilyn Kitchen, also indicated to officers that they thought defendant was the culprit. At trial, however, all three witnesses changed their opinions. The victim denied making the statement that she was sure defendant was the attacker and both Williams and Kitchen testified that, upon further consideration, they concluded that defendant could not have committed the crime. Thus, to the extent the witnesses testified to opinions regarding defendant's guilt or innocence, they expressed the view that defendant was not guilty. Defendant was not denied a fair trial by this testimony.

The victim's statement to the officer, that she was "99 percent sure" it was her son, was allowed by the court based on MRE 801(d)(1)(C) (statement of identification made after perceiving the person). The Michigan Supreme Court has held that prior statements of identification are not hearsay regardless of whether the declaration is denied or affirmed at trial. *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994). Defendant asserts that the statement was not truly a statement of identification, but was really a statement of a conclusion that based on actual observation of the attacker. *People v Sykes*, 229 Mich App 254; 582 NW2d 197 (1998). We conclude that any error in the admission of the victim's statement as a non-hearsay statement of identification is harmless because the statement was virtually identical to the victim's preliminary examination testimony, which was admissible. Prior statements of a witness are not hearsay if "the declarant testifies at the trial or hearing and is subjection to cross-examination" and the statement is "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." MRE 801(d)(1)(A).

Williams' and Kitchen's prior statements were admitted for impeachment purposes only and the jury was so instructed. To the extent there was relevant testimony from Williams and Kitchen, other than that concerning their prior statements, as to which their credibility was relevant, evidence of prior inconsistent statements was properly admitted to challenge the credibility of their testimony at trial.

Further, any error in the admission of evidence concerning Williams' and Kitchen's prior statements was harmless because the evidence against defendant was overwhelming. On two occasions, defendant confessed his crime to a police officer. When the officer told defendant he wanted to get patrol cars out to look for the person that did this to his mother, defendant replied "you don't have to. I did it." Later, defendant explained in more detail the fact that he drove home in somewhat of a rage and that only when he got to the trailer did he decide to stab the victim. He detailed that he went into the kitchen and grabbed a knife and then stabbed the victim while she was lying in bed. Defendant admitted that after he drove away, he threw the knife out of the car window. The confessions were corroborated by the fact that there was no forced entry and that defendant had a key. In addition, the victim testified that her dog never barked that night, but would normally bark at strangers.

Defendant also alleges that he received ineffective assistance of counsel at trial because counsel failed to object to the foregoing evidence. Regardless of counsel's reason for failing to object, we observe that following the prosecution's questioning of Williams and Kitchen in which the prosecution elicited testimony that they both initially thought defendant was guilty, defense counsel questioned both witnesses as to their *ultimate* opinion regarding defendant's guilt and was able to elicit their testimony

that they no longer believed defendant was responsible for the crime. Further, defendant has not shown that defense counsel's alleged errors prejudiced him or affected the outcome of the trial. *Daniel, supra,* 207 Mich App 58.

Defendant next argues that the prosecution engaged in several instances of misconduct. Defendant claims the prosecution wrongfully elicited opinion and hearsay testimony regarding defendant's guilt. Defendant also maintains that the prosecution wrongfully attempted to delve into defendant's alleged assaultive behavior toward the victim in the past by arguing that the victim feared defendant and pointing out that both Williams and Kitchen told officers that there was abuse in the past. Finally, defendant believes he was denied effective assistance of counsel at trial when his attorney failed to object to the repeated instances of prosecutorial misconduct. We disagree. Whether a defendant received a fair and impartial trial is the test for prosecutorial misconduct. *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995).

As to defendant's claim that the prosecution wrongfully introduced evidence of possible abuse and the victim's fear of defendant, evidence of the victim's fear of defendant was admissible as an explanation for why her preliminary examination testimony was completely different from her testimony at trial. The prosecution argued that the victim may have changed her testimony in part due to her love for defendant, but also in part out of her possible fear of him given the fact that she had been living with defendant from the time after the preliminary examination until the time of trial. Prosecutors are given great latitude to argue the evidence and draw inferences from the evidence that supports their theory of the case. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant takes issue with the prosecution's questioning of witnesses regarding prior abuse, but defense counsel asked whether the witnesses had known of defendant being abusive in the past. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan,* 402 Mich 1, 16; 260 NW2d 58 (1977). Defendant argues that counsel was ineffective in failing to object to these instances of alleged misconduct. However, defendant has failed to overcome the presumption of trial strategy and has failed to establish the requisite prejudice.

Defendant next argues that he was denied effective assistance of counsel by counsel's failure to raise the defenses of intoxication and diminished capacity. We disagree. At the *Ginther* hearing,[1] the primary focus was on the over-all trial strategy of the defense. Defense counsel testified that, the way he saw it, they had three possible options: (1) a claim of diminished capacity or insanity; (2) a claim of intoxication; or, (3) a full denial of responsibility, attacking the credibility of the prosecution's witnesses. Counsel testified that defendant was adamant about not wanting to pursue a defense theory in which he had to admit that he committed the crime. In fact, defendant refused to finish his criminal responsibility psychiatric test against counsel's advice. Defense counsel's private investigator interviewed two witnesses who were drinking with defendant the night of the stabbing and who stated that defendant was "bombed" and so drunk he could hardly walk. But, an intoxication defense would have required an admission of guilt. Thus, although counsel knew that the third option was the weakest, he was forced to proceed with defendant's preferred course of action.

The victim testified that defense counsel was mistaken and that she, defendant and counsel had all agreed that defendant was going to use the intoxication defense. However, the day that trial began,

defense counsel changed strategy. Defendant testified that he suffered from clinical depression and, on the night of the stabbing, he was so intoxicated he did not remember anything. Defendant denied that counsel recommended anything other than a not guilty strategy. In fact, counsel indicated that the defenses of intoxication or diminished capacity would be very costly. Defendant denied that counsel recommended that he undergo a criminal responsibility psychiatric test.

The trial court issued an opinion and order denying defendant's motion for new trial. The court determined that counsel's testimony was credible. Counsel had presented the options to defendant, and while counsel advocated a diminished capacity or intoxication defense, defendant did not want a defense that showed he was responsible. The court also found that there was no certainty that either of the defenses would have been successful. These questions of credibility were best left to the court as the trier of fact. *People v Daoust*, 228 Mich 1, 17; 577 NW2d 179 (1998).

We reject the argument that counsel was obliged to withdraw in the face of defendant's insistence on pursuing a weak defense. Counsel was still able to provide an effective defense. Further, there is no reason to believe that either of the defenses not pursued would have been successful given defendant's statements and the officer's description of his appearance.

Finally, defendant argues that the trial court should have declared a mistrial when an officer volunteered testimony about defendant's outstanding warrant. Defendant also argues that he received ineffective assistance of counsel at trial when counsel failed to request a mistrial. We disagree. The decision whether to grant a mistrial due to an unresponsive answer rests in the sound discretion of the trial court and that decision will not be disturbed on appeal absent an abuse of that discretion. *People v Coles*, 417 Mich 523, 555; 339 NW2d 440 (1983), overruled on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Ullah*, *supra*, 216 Mich App 673. There can be no abuse of discretion when a court has not been asked to exercise its discretion. *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986). The test for determining whether a mistrial is appropriate is not whether there was some irregularity, but whether the defendant received a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988).

It is true that the officer's testimony was nonresponsive to defense counsel's question. However, that does not necessarily mean that a mistrial was in order. Generally, an unresponsive, volunteered answer which injects improper evidence into a trial is not grounds for mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). A mistrial should be granted only when the incident is so egregious that the prejudicial effect can be removed no other way. *Coles*, *supra*, 417 Mich 554-555.

Here, the trial court did not abuse its discretion in failing to sua sponte grant a mistrial. There was no evidence that the prosecution knew in advance that the officer would respond in that manner, or conspired or encouraged the officer to give that answer. *Hackney*, *supra*, 183 Mich App 531. Further, the answer was brief and ambiguous, and defense counsel questioned whether the jury even

reacted to the answer. Defense counsel decided that as a matter of strategy there was no point in seeking a mistrial. We agree that a mistrial would not have been appropriate under the circumstances, and counsel was not ineffective in failing to seek a mistrial. Further, the decision not to pursue the option of a cautionary instruction was sound trial strategy.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Helene N. White

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).