

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

July 31, 2001

No. 222163

Wayne Circuit Court

LC No. 98-009095

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant to life in prison for the first-degree murder conviction and two years for the felony-firearm conviction. We affirm.

Defendant first argues that he showed by a preponderance of the evidence that he was legally insane at the time he committed the offense. We disagree.

The Legislature amended the insanity statute in 1994 to provide that the insanity defense is an affirmative defense and that the defendant has the burden of proof by a preponderance of the evidence. The relevant portion of the statute provides:

(1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code [now repealed MCL 330.1400a] . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.

(2) An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.

(3) The defendant has the burden of providing the defense of insanity by a preponderance of the evidence. [MCL 768.21a; *People v Mette*, 243 Mich App 318, 324-325- 621 NW2d 713 (2000).]

Mental illness is defined in MCL 330.1400(g) as a "substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." *Mette, supra* at 325.

Lay and expert testimony was presented as relevant to the issue of defendant's sanity. It is the province of the trier of fact to assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 636-647; 576 NW2d 129 (1998).

Defendant argues that evidence of defendant shooting his girlfriend, LaSonga Robinson, in the presence of police officers weighs in favor of defendant's assertion that he lacked the capacity to conform his conduct to the requirements of the law. "[I]f credible testimony offered by a defendant establishes that he could not refrain from acting even if faced with immediate capture and punishment, then the defendant would have gone a long way toward establishing that he lacked the requisite substantial capacity to conform to requirements of the law." *People v Jackson*, 245 Mich App 17, 21; 627 NW2d 11 (2001). We agree that this particular aspect of the circumstances surrounding the shooting was evidence in favor of defendant's claim of insanity. Nevertheless, the jury was properly permitted to consider all the circumstances surrounding the shooting together with expert testimony on the issue of insanity. There was lay testimony in support of the prosecution's position that defendant acted in a controlled and goal-directed manner, and the prosecution's expert testified that although defendant suffered mild dementia, he did not lack substantial capacity to appreciate the wrongfulness of his conduct, and was not unable to conform his conduct to the requirements of the law. Defendant's capacity was a question of fact for the jury. We cannot conclude on this record that defendant established his insanity by a preponderance of the evidence as a matter of law.

Defendant next argues that he was denied due process because the prosecutor misstated the evidence and the law to the jury. Again, we disagree. This Court reviews claims of prosecutorial misconduct on a case by case basis, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). If a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. A preserved nonconstitutional error is not a ground for reversal unless, after examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210; 602 NW2d 584 (1999).

A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, but is free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Defendant argues that the prosecutor stated that the prosecution expert "had not testified that defendant was mentally ill" when, in fact, he testified that defendant did suffer a mental illness. Defendant objected at trial. However, the prosecutor's statement, when taken in context, was not a statement of fact to the jury that was unsupported by the evidence.

In rebuttal argument, the prosecutor said:

You heard that the Defendant was not mentally retarded at all. There was no testimony about that. So that is not for your consideration. Your consideration is confined to whether there was any kind of mental illness that would keep this man from being held criminally responsible, that would make him legally insane.

There are two words that are really important for you, because even though there was no mental illness that was cited by Dr. Kolito there is a word that does apply to the Defendant.

[Objection, response and ruling.]

[Prosecutor]: Manipulative. He's a manipulative man.

In fact, Dr. Kolito had testified that while defendant suffered from mild dementia and depression, these conditions did not significantly impair his judgment, behavior, capacity to recognize reality, or his ability to cope with the ordinary demands of life. Thus, Dr. Kolito did not find mental illness as defined by the statute because although he found some impairment, he did not regard it as substantial. Viewed in this context, the prosecutor's statement was fair comment on the testimony.

Defendant also contends that the prosecution's statement that premeditation and deliberation could be inferred from defendant's use of a deadly weapon constituted plain error that affected his substantial rights. The prosecutor argued:

And that instruction is going to say that first[-]degree murder is the killing of a person with the intent that can be inferred by this use of a deadly weapon. She's going to read you an instruction that says that we can infer the use of a deadly weapon and its consequences.

That means that you know if you use a gun in a certain way, that if you pull the trigger aiming it at a part of a person's body that could kill them, we can infer that you intended to use deadly force. That there was malice in your mind. That you thought about it. That you deliberated it. That you premeditated it, thought about it beforehand.

Defendant did not object at trial.

The prosecutor's statement incorrectly merges the concepts of intent and malice with premeditation and deliberation. Nevertheless, we find no reversible error. In the remainder of her argument, the prosecutor clearly focused on the separate requirements of premeditation and deliberation, directing her comments to the opportunity to take a "second look" and reflect, rather than to the mere use of a dangerous weapon. Further, the court gave proper instructions on the issue, and the jury was instructed to rely only on the court's statement of the law. Thus, defendant has not demonstrated that the prosecution's isolated statement that premeditation and

deliberation could be inferred from defendant's use of a deadly weapon constituted plain error that affected his substantial rights.

Affirmed.

/s/ Helene N. White

/s/ David H. Sawyer

/s/ Henry William Saad