

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN E. BANKS,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 244282

Wayne Circuit Court

LC No. 01-002619

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

A jury found defendant guilty, but mentally ill, of second-degree murder, MCL 750.317, as a lesser offense to an original charge of first-degree murder. He was sentenced to a term of twenty to forty years' imprisonment, with credit for 464 days served. He appeals as of right. We affirm.

I

Multiple witnesses testified that defendant admitted killing his wife (Phyllis Banks). Indeed, it was undisputed at trial that defendant killed her. The principal issue at trial was defendant's state of mind at the time of the killing, particularly whether he was legally insane.

Dawn Hash testified that, in addition to admitting that he killed his wife, defendant said, "she took my life by taking my kids." Doreen Handy similarly testified that, in connection with admitting that he killed his wife, defendant said, "I have to do it this way if I ever want to get my kids back because she threatened my life by taking my kids away."

Officer Anthony Hill testified as follows about what defendant told him about killing his wife:

He had told me that he was in the bedroom, he was choking her, and he kept on choking her and she wouldn't die quick enough. He stated that she keeps a knife up under the pillow. He then reached up under the pillow and took the knife and slit her throat.

Sergeant Felix Kirk testified that defendant signed a written statement that included the following information about the incident:

I went to the house today and my wife and I started talking. And then we started arguing. She said she didn't want to be a mother or a wife to my children or to me. We were in the bedroom. I started strangling her. She started gasping for air. I saw a knife by the pillow on the bed. I got it and cut her throat with it. I thought it would be best this way because I knew if I left, she just wasn't going to take care of the kids right.

Kirtis Thomas, a psychologist and professional counselor, estimated that he began seeing defendant as a patient about a year before the offense. Defendant reported having "intruding thoughts of violent fantasies." In his last meeting with defendant (which occurred about a month before defendant killed his wife), defendant spoke of having a poor sense of control over his temper and said that he felt "lost since the death of his mother." According to Thomas, defendant called him three days later and said he had a significant argument with his wife, which may have "become physical in nature." Thomas told defendant if he felt he could not control himself that he should leave immediately. Thomas believed that defendant "snapped, he went from being safely in the ballpark to being out there" when he killed his wife.

Edward Nol, M.D., a psychiatrist, opined that defendant had a complete lack of capacity to conform his conduct to the law at the time of the incident. He indicated from talking with defendant about the incident that defendant "lost it" at that time. When questioned about why he came to that conclusion, Dr. Nol noted that it appeared to him there were obsessive elements in defendant's behavior and probably in his personality, that there was depression and lack of involvement in interpersonal contact, and that he "could not believe that anyone in his right mind would do what he did." Dr. Nol said that "the best explanation in my opinion for totally irrational behavior is a moment of insanity, a moment of craziness."

Edith Montgomery, Ph.D., a forensic psychologist, also evaluated defendant in connection with the homicide of his wife. Dr. Montgomery indicated that nothing defendant described to her indicated that he was either "out of touch with reality" or did not know what he was doing at the time of the killing. She also testified that she saw nothing indicating that defendant was mentally ill for purposes of criminal responsibility. Dr. Montgomery found nothing in her assessment to indicate that defendant was unable to conform his conduct to the law when he killed his wife or that he could not distinguish right from wrong.

II

Defendant argues that certain remarks by the prosecutor in the course of defense cross-examination of a witness constituted misconduct warranting a new trial and that the trial court erred in denying his request for a mistrial or a cautionary instruction based on those remarks. We disagree. With regard to the claim of prosecutorial misconduct, we consider whether the alleged misconduct, viewed in context, denied defendant a fair and impartial trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). We review the trial court's denial of a mistrial for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). As to the denial of a cautionary instruction, we review de novo a trial court's decision whether to give a special jury instruction. *People v Herndon*, 246 Mich App 371, 421; 633 NW2d 376 (2001).

While cross-examining Dawn Hash, defense counsel asked her if defendant seemed “to have a reputation of a person who, in fact if there [sic] a person of peace.” The prosecutor interrupted, asking for “clarification” of whether “we’re going to use character evidence” and, if so, asked that it be noted on the record “because that opens the door for a lot of information.” A discussion followed between the trial court and counsel in the presence of the jury, during which the prosecutor indicated that defense counsel’s question “brings into play as the [c]ourt certainly knows a whole series of kinds of information that would not otherwise be admissible which I will explore with the remaining witnesses if that’s what counsel intends to do with this witness.”

Thereafter, defense counsel requested a mistrial based on the prosecutor’s references to bringing in additional information if the defense offered testimony that defendant had a reputation for peacefulness. Defense counsel also alternatively requested a curative instruction. During the course of the ensuing discussion between the trial court and counsel outside the jury’s presence, the prosecutor indicated that, if the defense offered evidence that defendant had a reputation for peacefulness, she would respond by bringing out evidence that defendant had struck his wife about a month before the incident in which he killed her, a matter that the prosecutor otherwise would not have injected into the trial. The trial court denied the request for a mistrial saying, “I don’t think that even borders on there being a mistrial” and also denied the request for a curative instruction because it did not think such an instruction was necessary.

When defense counsel resumed his cross-examination of Hash, she testified that defendant had a reputation of being a peaceful man. Defense counsel also asked Hash if her view of defendant’s reputation for peacefulness would change if she knew about a prior incident in which he struck his wife, to which Hash replied, “I didn’t even hear that information. I didn’t know nothing about that.”

The prosecutor subsequently asked Brett Banks, the eleven-year-old son of defendant and the victim, if he had ever seen or heard defendant hit the victim and Brett said no. During direct examination by the prosecutor, Doreen Handy testified that defendant told her that he had to “leave before [he] hurt her, [he] hit her.” The prosecutor asked Kirtis Thomas, on cross-examination, if defendant had told him that he hit his wife. In response, Thomas said he believed that defendant had indicated that he struck his wife about a month before the incident.

The prosecutor’s remarks indicating that, if the defense offered testimony that defendant had a reputation as a peaceful person, this would allow her to explore information that otherwise would not be allowed, may well have been ill-advised. This is particularly so considering that the prosecutor did not need to interrupt defense counsel’s cross-examination of Hash to effectively state that she had no objection to defense counsel asking the witness if she knew that defendant had a reputation as a peaceful person. In this regard, the prosecutor had no duty to place defense counsel on notice that this would or might “open the door” for the prosecutor to respond with evidence that might otherwise not be admissible, because it is axiomatic that defense counsel had his own duty to be familiar with legal principles related to the admissibility of evidence and that a party is responsible for its own trial strategy. However, considered in the context of the entire trial, we conclude that defendant is not entitled to relief because the prosecutor’s remarks did not deny defendant a fair and impartial trial. *Goodin, supra* at 432. As set forth above, after defense counsel elicited testimony from Nash that defendant had a reputation as a peaceful person, witnesses were questioned regarding whether defendant had previously hit his wife. In all likelihood, the jury related this questioning as responsive to the

testimony about defendant's reputation for peacefulness. There is little reason for the jury to have concluded from the prosecutor's vague remarks that there was further information known to the prosecutor, but not presented at trial, that reflected negatively on defendant's character for peacefulness. Accordingly, we conclude that the prosecutor's remarks did not deny defendant a fair and impartial trial because their effect was merely to reference questioning and testimony that was later elicited, not to suggest the existence of additional information regarding defendant that was not presented at trial. We also note that the remarks in question were isolated, and occurred in the course of a lengthy trial, which reinforces our conclusion that they did not improperly influence the jury.

The present case is not comparable to the circumstances in *People v Wolverton*, 227 Mich App 72; 574 NW2d 703 (1997), or *People v Fisher*, 193 Mich App 284; 483 NW2d 452 (1992), upon which defendant relies. In *Wolverton*, the defendant's conviction for operating a vehicle under the influence of intoxicating liquor was reversed based on the prosecutor's reference in opening statement to the incriminating results of a blood alcohol test that was ultimately held inadmissible, although the reference was apparently made in good faith. *Wolverton*, *supra* at 74-78. In contrast to the prosecutor's vague remarks about additional information in the present case, the remarks in *Wolverton* directly referenced inadmissible evidence that was highly incriminating, and a juror could not reasonably be expected to disregard the reference. In *Fisher*, this Court in dicta disapproved of prosecutorial remarks in closing argument that were unsupported by the evidence. *Fisher*, *supra* at 291. This has no applicability to the present case. Thus, neither *Wolverton* nor *Fisher* alter our conclusion that the prosecutor's conduct at issue here did not deny defendant a fair and impartial trial.

It follows from our conclusion that the prosecutor's remarks did not deny defendant a fair and impartial trial that the trial court did not abuse its discretion, *Coy*, *supra* at 17, in denying defendant's motion for a mistrial based on those remarks. Also, the trial court did not err in declining to give a cautionary instruction related to this matter because such an instruction would have emphasized the questionable remarks with little or no benefit to defendant.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage