

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NASSIR ABDO HASAN,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 244290
Macomb Circuit Court
LC No. 00-003544-FC

Before: Cavanagh, P.J., Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for twenty-three counts of first-degree criminal sexual conduct (person under thirteen), MCL 750.520b(1)(a), six counts of first-degree criminal sexual conduct (relationship), MCL 750.520b(1)(b), and one count of third-degree criminal sexual conduct (incest), MCL 750.520d(1)(d). Defendant was sentenced to twenty-five to fifty years imprisonment for each first-degree criminal sexual conduct conviction and seventy-one months to fifteen years imprisonment for his third-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that he was denied his right to due process when the trial court erroneously ruled that he was competent to stand trial and/or refused to revisit the question of competency immediately before trial. We disagree.

The determination of a defendant's competence is within the trial court's discretion, and is reviewed on appeal for an abuse of discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). A criminal defendant is presumed competent to stand trial absent a showing that, because of his mental condition, he is incapable of understanding the nature of the proceedings against him or of assisting in his defense in a rational manner. MCL 330.2020(1); *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). "An incompetent defendant 'shall not be proceeded against while he is incompetent.'" *Harris, supra* at 102 quoting MCL 330.2022(1).

In May 2001, defendant was diagnosed with an adjustment disorder. A hearing was held to determine defendant's competency to stand trial. At the hearing, the prosecution presented two witnesses, Dr. Donald Proux, a psychiatrist with expertise in forensic evaluation and interviewing, and Jodie Mitchell, defendant's social worker, to establish that defendant was competent to stand trial.

Proux testified that he had met with defendant three times before the hearing. During two of those meetings, defendant was mute. On the one occasion that defendant did speak, defendant indicated to Proux that he understood the nature of the charges. Defendant denied the charges, and accused his daughter of lying. Defendant understood that he faced life imprisonment if convicted, and toward the end of the meeting, defendant expressed satisfaction with his attorney's representation. Proux then questioned defendant whether he would work with defense counsel, and defendant replied "no" without further explanation.

Proux testified that, in his opinion, defendant was malingering. Proux noted that until defendant believed he was to be charged with the instant offenses, he functioned very well in society. He had no history of mental illness, worked for DaimlerChrysler for twenty-seven years, owned a home, paid taxes and did all of the other things necessary to function in our society. Further, that defendant communicates with persons on a selective basis indicates that he is malingering. That is, defendant freely communicates with hospital staff members to arrange for candy and chips, but refuses to talk with his attorney.

Mitchell testified that she worked with defendant at the Caro Center over a period of six months to prepare him in court competency; the role of the judge, defense attorney, etc... In regard to her first meeting with defendant, she testified that defendant stated:

. . . he didn't know what the charges were and that he didn't know what the roles [sic] of the court was, but he told me that it was a bunch of bullshit and that his attorney told him not to speak to anybody and that he would stay at the Carroll Center and then he could return to his country and then he told me the meeting was over and he wouldn't talk to anyone anymore and he left.

Mitchell also testified that defendant spoke to her in English to make arrangements to receive candy and chips. Defendant would also tell Mitchell in English if he had medical complaints, such as a sore neck.

Mitchell testified that, on the day that she, Proux and Dr. Bobsar, defendant's treating psychiatrist, were to meet with defendant, defendant told Mitchell that he:

Wasn't mentally ill; he wasn't suicidal, he wasn't feeling depressed, he denied the charges, he understood all the roles of the court he was able to tell us what they meant. He told us that he wasn't going to cooperate with his attorney that Allah was going to judge him and he couldn't explain to us why.

The trial court found defendant competent to stand trial based on the above testimony and a report from Bobsar. Bobsar's report indicated that although he initially diagnosed defendant with an adjustment disorder, in February 2002, Bobsar changed defendant's diagnosis to malingering.

The test to determine whether a defendant is competent to stand trial is whether his mental condition renders him incapable of understanding the nature of the proceedings against him or of assisting in his defense in a rational manner. *Mette, supra* at 331. Here, defendant verbally expressed that he understood the nature of the charges against him and the role of the court. Also, the record contains substantial evidence that defendant was capable of assisting in

his defense in a rational manner, but consciously choose not to do so. Thus, we cannot conclude that the trial court abused its discretion in determining that defendant was competent to stand trial. Moreover, because defendant was behaving the same immediately before trial as he was during the competency hearing, the trial court did not abuse its discretion in refusing to reconsider the issue. MCR 6.508(B).

Defendant next claims that he was denied his right to a fair trial when the prosecutor made appeals to the jury's sympathy and civic duty during closing argument. A claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but the trial court's factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The test for prosecutorial misconduct is whether a defendant was denied his right to a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). "Generally, prosecutors are accorded great latitude regarding their arguments and conduct. Further, prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001), citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). The appropriateness of a prosecutor's remarks depends "on all the facts of the case, and they are evaluated in light of the relationship or lack of relationship they bear to the evidence admitted at trial." *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). However, appeals to the jury for sympathy constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Nor should a prosecutor urge the jurors to convict the defendant as part of their civic duty. *Bahoda*, *supra* at 282. Furthermore, a prosecutor may not inject racial or ethnic remarks into any trial. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999).

During closing argument, the prosecution argued that the victim had lost some of her dignity by testifying at trial that her father raped her and that she had to be examined by a physician who used a rape kit. Defense counsel objected on the basis that the comments improperly appealed to jurors' sympathy, but the trial court overruled the objection because the comments were made in response to the defense's theory that the victim was falsely accusing her father of rape because he was too strict and physically abused her. We agree with the trial court that these comments were not an improper appeal to jury sympathy and were made in response to the defense theory that the victim falsely accused her father of rape. *Knapp*, *supra*.

We also find without merit defendant's claim that he was denied a fair trial because the prosecution improperly urged the jury to convict defendant as an act of civic duty. Defendant premises this argument on the following statement made by the prosecution during closing argument:

I don't understand why it's like that. I don't understand why he's like that. But I have an idea. Why don't we wake him up today. Why don't we wake him up by saying guilty 30 times. I have an idea that that might get his attention. Maybe if we said (gesture made) you're guilty Mr. Hasan. You don't rape kids in this country. Maybe if we say that to him he'll wake up and face us all.

Immediately after the statement was uttered, defense counsel objected, and the trial court gave the following curative instruction:

Any exhortation by your verdict you are asked to send a message to someone who is – to someone who is not a native to this country is not to be considered . . . in reaching your verdict. It has nothing to do with this case. Remember you’re to decide this case solely on the evidence. You’re to put all your feelings regarding race, creed, nationality, color aside.

On appeal, defendant argues that the comments urged the jury to convict defendant as an act of civic responsibility, suggesting that if the jury found defendant guilty, it would be telling him “we don’t rape kids in this country.” However, the prosecution did not dwell on defendant’s nationality and defendant’s specific objection was immediately addressed by instruction from the court. Thus, because jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and in light of the overwhelming evidence of guilt against defendant, we conclude that the prosecutor’s comment did not so prejudice the jury as to deny defendant a fair trial. *Rodriguez, supra* at 32.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra