STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY LEIGH CAMBURN,

Defendant-Appellant.

UNPUBLISHED
October 5, 2004

No. 246786
Ottawa Circuit Court
LC No. 01-025251-FC

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty, but mentally ill, of two counts of first-degree premeditated murder. MCL 750.316(1)(a). She was sentenced to life imprisonment without parole for each conviction. She appeals as of right. We affirm.

Defendant's convictions arise from the stabbing death of her two daughters, aged five and ten. On the morning of September 10, 2001, defendant decided to keep her children home from school. She telephoned their respective schools and absented them from class. She talked to several other people on the telephone that morning as well, including her mother, a friend, and two people from the local Christian radio station. According to defendant, at approximately 10:00 a.m., she stabbed the children to death. She claimed that she did so because she heard voices outside, believed that "they" were coming inside to torture and kill the children and to kill her, and that she heard the door to her house open. She claimed that she killed the children to protect them.

Defendant denied criminal responsibility for the killings. She presented the affirmative defense of criminal insanity and offered testimony from three forensic experts, who testified that she suffered from a rare delusional disorder and was legally insane at the time she stabbed the children. The jury rejected the insanity defense, and determined that defendant was guilty but mentally ill at the time she killed her children.

I

Defendant first argues that the trial court abused its discretion by denying her motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. A motion for a new trial based upon the great weight of the evidence should be granted "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice

would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Conflicting testimony or a question as to the credibility of a witness is not sufficient grounds for granting a new trial. *Id.* at 643. When reviewing a trial court's decision on this issue, this Court may not attempt to resolve credibility questions anew. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). We will not reverse a trial court's decision on a new trial motion absent an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). An abuse of discretion exists if the ruling was "so violative of fact and logic that it indicates either a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002).

A person is legally insane if, as a result of a mental illness, "that person lacks substantial capacity either to appreciate the nature and quality of the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). A defendant is presumed sane. *People v Jones*, 151 Mich App 1, 5; 390 NW2d 189 (1986); *People v John*, 129 Mich App 664, 666; 341 NW2d 861 (1983). The defendant bears the burden of proving insanity by a preponderance of the evidence. *People v Mette*, 243 Mich App 318, 325; 621 NW2d 713 (2000); *People v McRunels*, 237 Mich App 168, 172-173; 603 NW2d 95 (1999).

We conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on the ground that the jury's finding of sanity was against the great weight of the evidence. While all three of the forensic experts diagnosed defendant with the same rare delusional disorder and concluded that she was legally insane, the prosecutor tested the credibility of that testimony. Dr. Charles Clark ultimately admitted that this was not a case where all of the arrows pointed to one conclusion. All three experts expressed reservation about defendant's veracity with respect to certain aspects of her story, and, yet, her version of events formed the primary basis for the experts' opinions. Two experts testified that they did not believe defendant when she indicated that she could not recall writing a certain note on September 8, 2001. All three experts also conceded that defendant had offered other "motives" or explanations for the killings. She expressed that she was "possessed." She also offered that she did not want the children to suffer spiritual torture, like she had. And, there was evidence that she believed there was a conspiracy at her church. Because defendant provided varying explanations of what may have precipitated the stabbings, the story she relayed to the experts could have been viewed as suspect and not credible.

Defendant also misrepresented other aspects of her life when speaking with the experts. For example, she denied that she believed she was going to marry the youth pastor at the church and denied that she believed her book would be published. Other witnesses, however, testified that defendant believed God chose the youth pastor to be her next husband and that she was already planning to sell her book. In addition to evidence discrediting defendant, which, in turn, made the experts' opinions subject to doubt, there was evidence that the forensic experts did not understand the relationship of defendant's religious beliefs to her situation. Moreover, there was evidence that defendant was manipulative and exhibited characteristics of a histrionic personality disorder, which can be a very persuasive and powerful disorder. The expert opinions in this case were clearly subject to question by the jury; they were not conclusive.

Additionally, the prosecutor presented evidence indicating that defendant appreciated the nature and quality of the wrongfulness of her conduct and could conform her conduct to the requirements of the law. After she killed her children, she told her ex-husband to "be a man" and

they could keep the matter between themselves. Moreover, while there was strong evidence that defendant was suffering severe difficulties on September 9, 2001, there was evidence that she was in control and in a lighter mood on September 10, 2001, the day of the offense. She was able to make telephone calls excusing her children from school and to conduct other business via telephone. Her mother spoke with her on the telephone early in the morning on September 10, 2001, and described her as acting normal and being appreciably different than the previous night. Defendant drove her van after the killings and returned home safely, thereby supporting an inference that she was able to obey traffic laws and conform her behavior to them. While the experts offered opinions that normal occupational and social functioning is not unusual for someone suffering from a delusional disorder, the jury was free to disregard this testimony. See *People v Renno*, 392 Mich 45, 60; 219 NW2d 422 (1974); *People v Clark*, 172 Mich App 1, 8-9; 432 NW2d 173 (1988). The jury was also free to accept lay testimony about defendant's condition on the day of the killings. *People v Murphy*, 416 Mich 453, 465; 331 NW2d 152 (1982) (the testimony of lay witnesses may be competent evidence of sanity and may rebut expert testimony on the issue).

In addition, there was testimony from the prosecutor's rebuttal witness that defendant could have conformed her behavior to the requirements of the law. Further, defendant's own experts offered testimony indicating that defendant could appreciate the wrongfulness of her conduct. Dr. David Boersma conceded that defendant knew it was unlawful and a sin to kill the children, and he noted that her suicide attempt could be viewed as an indication of the consciousness of wrongdoing. Dr. Anton Tolman conceded that defendant's notes, written after the killings, could be viewed as expressions of remorse and acknowledgements of wrongdoing. In one of her notes, defendant wrote, in part: "I am sooo sorry. I confess my sin." Dr. Clark testified that defendant had control and knew what she was doing. According to Dr. Clark, the fact that defendant started and stopped her own suicide demonstrated positive control by defendant over her actions. He further admitted that defendant's statement to her ex-husband, about keeping the matter between them, demonstrated her awareness that what she did was wrong and harmful to her interests.

Resolution of the issue of defendant's insanity rested on credibility determinations made by the jury. Defendant has not demonstrated that the credibility determinations should be removed from the jury. *Lemmon, supra* at 642-643. We will not resolve the credibility issues anew. *Gadomski, supra.* Under the circumstances, the trial court's ruling denying defendant's motion for a new trial was not "so violative of fact and logic that it indicates either a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Libbett, supra.*

II

Defendant next argues that the evidence was legally insufficient to sustain the jury's verdict of "guilty but mentally ill." We review the sufficiency of the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *Murphy, supra* at 456; *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

At the time of the charged offense, MCL 768.36 provided:

> (1) If the defendant asserts a defense of insanity in compliance with section 20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:
>
> (a) That the defendant is guilty of an offense.
>
> (b) That the defendant was mentally ill at the time of the commission of that offense.
>
> (c) That the defendant was not legally insane at the time of the commission of the offense.

The prosecutor had the burden of proving beyond a reasonable doubt that defendant was not legally insane and should not be exculpated on the basis of mental infirmity. *People v Stephan*, 241 Mich App 482, 492-493; 616 NW2d 188 (2000).[1]

Defendant challenges only the sufficiency of the evidence offered to prove beyond a reasonable doubt that she was not legally insane at the time of the killings. The nature and amount of evidence required to sufficiently overcome a defendant's assertion of insanity varies from case to case. *People v Banks*, 139 Mich App 45, 47; 361 NW2d 1 (1984), citing *Murphy, supra* at 464. Where substantial evidence of insanity is produced by a defendant, the prosecutor is required to submit substantial evidence of sanity. *Banks, supra* at 49. In *Murphy, supra* at 464-466, the Court held that, because substantial evidence was offered to show the defendant's insanity, the testimony of four police officers, who had minimal contact with the defendant and only had contact with him after the crime, was insufficient to support a finding of sanity beyond a reasonable doubt. The Court concluded that the prosecutor needed to present something more than minimal evidence of sanity under the circumstances, where all of the vital evidence pointed toward the defendant's insanity. *Id.* at 466. In *John, supra* at 666-667, the defendant offered substantial evidence to support his insanity defense. The prosecutor offered no rebuttal testimony and relied only on cross-examination of the defendant's experts and on evidence from its case-in-chief that the defendant was rational and coherent after arrest. *Id.* This Court

[1] At the time, there was a conflict between the insanity burden of proof and the burden of proof with respect to a finding of guilty but mentally ill. See *Stephan, supra* at 485, 499-500. In *Stephan, supra* at 492, this Court noted that the Legislature had failed to amend the "guilty but mentally ill" statute, MCL 768.36, after amending MCL 768.21a to place the burden of proof on defendants with respect to an insanity defense. This Court recognized that the conflict was a *potential* problem in every criminal case, *id.* at 499-500 (emphasis added), but did not resolve the conflict, recognizing that the issue had to be addressed by the Legislature. *Id.* at 507-508. The Legislature eventually amended MCL 768.36 to reflect that the burden of proof on an insanity defense rests with the defendant. But the amendment did not become effective until April 30, 2002, which was after the date of the charged offenses in this case. As such, the amendment is not applicable to defendant's case. *People v Dolph-Hostetter*, 256 Mich App 587, 595; 664 NW2d 254 (2003); see also *Carmell v Texas*, 529 US 513; 120 S Ct 1620; 146 L Ed 2d 577 (2000); *McRunels, supra* at 175-180.

determined that the prosecution's evidence was insufficient to convince a rational trier of fact that the defendant was sane beyond a reasonable doubt. *Id.*

In this case, we agree that there was substantial evidence of defendant's insanity. Indeed, the court-appointed forensic examiner, defendant's hired forensic examiner, and the prosecutor's hired forensic examiner, all agreed that defendant was legally insane. However, unlike the prosecutors in *Murphy* and *John, supra,* the prosecutor herein offered considerable evidence of sanity to rebut defendant's affirmative defense. The lay witness testimony provided evidence of defendant's sanity on the day of the killings, both before and after they occurred. While defendant acted in a very unusual manner on September 9, 2001, she spoke to several people on the telephone and conducted appropriate business on September 10, 2001. She contacted her daughters' separate schools to excuse them from class. She contacted the radio station about volunteering. When she spoke to her mother, her mother noted that she was much more lighthearted and relaxed than the previous evening. These calls were apparently made before the killings.

After the killings, defendant engaged in conduct that evidenced an understanding of the wrongfulness of her conduct: she asked Thomas to keep the matter "between" them; she left the scene and later returned; the weapon used to kill the children was never identified from the house (leading to an inference that defendant disposed of the weapon when she left in her van); it appeared that defendant was aware that she needed to change her clothes before leaving the house; she wrote a note that appeared to express remorse or a consciousness of wrongdoing; she attempted "suicide," which Dr. Boersma conceded could be a sign that she acknowledged her wrongdoing; and, when the police were en route to her house, she called her parents and made a statement of apology.

In addition, the shades in defendant's house were down on the morning of the killings, which was unusual. An inference could be drawn that defendant did not want anyone to see what was occurring in the house. Defendant's actions not only evidenced a consciousness of wrongdoing, but also an ability to conform to the requirements of the law. Clearly, she was able to drive safely and return home, thus suggesting that she could follow the rules of the road. This occurred approximately one hour after the killings. Moreover, Dr. Donald Topp's rebuttal testimony supported the premise that defendant could have conformed her behavior to the requirements of the law.

Not only was there evidence of defendant's sanity on the day of the killings, but the forensic experts' testimony was effectively challenged by the prosecutor and contained important concessions as previously discussed.

Viewed in the light most favorable to the prosecution, we conclude that the evidence was sufficient to enable a rational trier of fact to determine beyond a reasonable doubt that defendant was not insane when she fatally stabbed her children. Defendant's substantial evidence of insanity was met by substantial lay witness testimony and other evidence, including circumstantial evidence and reasonable inferences, which supported the verdict.

III

Defendant additionally argues that the admission of crime scene and autopsy photographs was unfairly prejudicial and warrants reversal. This Court reviews the admission of photographic evidence for an abuse of discretion. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

> The decision to admit or exclude photographs is within the sole discretion of the trial court. *Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion.* The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. [*People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995) (emphasis added).]

We have reviewed the photographs. They were relevant to issues presented at trial, including the issues of premeditation and deliberation, and the nature and extent of the victims' injuries. The photographs also were relevant to demonstrate that defendant moved the bodies after their death, and to establish the existence of defensive injuries on the victims. It does not matter that defendant did not contest her role in the killing of the children. It is well established that all of the elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The prosecutor carries the burden of proof of every element beyond a reasonable doubt regardless of whether the defendant disputes the elements. *Id.* It also does not matter that the police officers and pathologist could have testified to what they observed without admission of the graphic pictures. *Mills, supra.* Further, admission of gruesome photographs for proper purposes is not prohibited merely because the photographs portray the gruesome details or shocking nature of the crime. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). The photographs at issue were not admitted solely to arouse the sympathies or prejudices of the jury. *Id.* They were relevant and accurately portrayed the violent murders. Additionally, it is apparent that the trial court carefully considered the admission of the photographs and took the opportunity to review them before ruling whether to admit them. We trust the trial court's thoughtful exercise of its discretion in this regard. *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001).

IV

Defendant next argues that a new trial is warranted on grounds of juror misconduct. We review for an abuse of discretion a trial court's ruling on a new trial motion based on juror misconduct. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

Before sentencing, defendant moved for a new trial, arguing, in part, that juror misconduct warranted reversal and a new trial. Defendant submitted an affidavit from a co-worker of Juror 149. The co-worker averred that, on the third day of trial, she asked Juror 149 why he was not participating in a company audit. He replied, "I have jury duty, that damn woman in Zeeland who murdered her kids." Defendant argues that the juror's remark disclosed a predisposition and bias against her.

Not every instance of misconduct in a juror will require a new trial. *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998).

> To be entitled to a new trial on the basis of juror misconduct, defendant must "establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." [*Crear, supra* at 167, quoting *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998).]

There must be a showing that the misconduct affirmatively prejudiced the defendant's right to a trial before an impartial and fair jury. *Fetterley*, *supra* at 545.

> [T]he misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice. [*Id.*]

In this case, defendant has not shown any prejudice or demonstrated that Juror 149 was excusable for cause. After two days of trial, wherein the jurors heard defendant's attorney admit that defendant actually stabbed the children, Juror 149 explained that he could not participate in his company's audit because of his jury duty on the case of "that damn woman from Zeeland who murdered her kids." But nothing in the record supports that, at the time of jury voir dire, the juror had formulated an opinion that defendant was guilty of murdering her children. He was questioned by both defense counsel and the prosecutor. There is no indication in the record that he falsely denied or concealed anything during voir dire or misrepresented himself when he agreed that he would give the insanity defense a fair and impartial hearing. Thus, the record does not establish that the juror was excusable for cause.

Moreover, the record does not indicate that defendant was *actually* prejudiced by Juror 149's presence on the jury. The comment at issue does not automatically lead to a conclusion that the juror had made up his mind on defendant's guilt at the time he made the statement. An alternative theory behind the comment is that the juror felt frustrated about missing his company audit and expressed this frustration when explaining why he would not be at the audit. It is not possible to determine the import of Juror 149's comment. Defendant assumes that there is prejudice, but cites no authority to support that prejudice should be presumed. Additionally, several days of trial took place after the juror made the statement. Many witnesses testified and supported defendant's criminal insanity defense. The jury deliberated for a substantial period of time after hearing all of the evidence, and nothing in the record supports that Juror 149 shared his thought with the jury or was predisposed to rejecting the insanity defense.

We therefore conclude that defendant is not entitled to a new trial on the basis of juror misconduct. The trial court did not abuse its discretion in denying defendant a new trial on this basis.

V

Finally, defendant argues that reversal is warranted because the jury was improperly instructed. This issue is waived because defendant specifically indicated that he did not have any

objections or corrections to the court's jury instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Nevertheless, we note that the trial court did not improperly instruct the jury. It instructed the jury in accordance with the applicable law at the time. *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004); *Stephan, supra.*

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra