STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2008
v	No. 272019 Washtenaw Circuit Court
KARRIE MUNLIN, JR., Defendant-Appellant.	LC No. 05-001976-FC

Before: Saad, P.J., and Murphy and Donofrio, JJ.

MURPHY, J. (*dissenting*).

I respectfully dissent. The majority concludes that, "without further development, there is an insufficient record for us to assess whether the complainant's condition or her medications might impair her ability to perceive or recall particular events and we cannot evaluate whether the trial court properly exercised its discretion in excluding questions regarding her mental history." The majority remands for creation of a record, giving defendant an opportunity to present an offer of proof after noting that "it is not evident from the trial transcript whether defense counsel made a prior, unrecorded argument or offer of proof on this issue."

The trial transcript reflects that the full extent of defendant's arguments and assertions to the trial court on the issue regarding the complainant's psychiatric history were encompassed within the bench conference. It appears that the trial court's statement, made during the bench conference, that there was no basis to "change" its ruling was simply a misstatement, with the court believing that it had earlier sustained the prosecutor's objection to the evidence. If the trial court had indeed previously addressed and rejected an argument by defendant on the issue off the record, it would make no sense for the court to ask defense counsel in the bench conference, as it did, counsel's basis for seeking to admit the evidence. Moreover, defendant, in his appellate brief, cites in support of his argument only the pages of the transcript covering the bench conference. There is absolutely no claim that defendant made an earlier, off-the-record argument on the issue or that an offer of proof was made. The majority opinion effectively gives defendant a second bite at the apple by remanding for a hearing to allow defendant to make an offer of proof that was not made at trial.

MRE 103(a)(2) provides that "[a]n error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." No offer of proof[1] was made on the record presented, nor claimed to have been made by defendant. Thus, the complainant's actual psychiatric history was not made known to the court.[2] It is apparent from the record, however, that the court was aware of the substance of the evidence that defendant was seeking to introduce, which concerned complainant's psychiatric history and specifically complainant's alleged schizophrenia. Again, we can only speculate regarding whether the complainant suffers from schizophrenia and whether she was having a schizophrenic episode when the rape occurred. Moreover, assuming that she was suffering from the disease when the attack took place, there was nothing argued or presented to the trial court regarding whether, in the words of the majority, "there is a reasonable nexus between the complainant's alleged mental illness and her ability to perceive and understand events[.]" During the bench conference, the trial court asked defense counsel, "How does it – I mean are you going to put on some expert testimony about schizophrenia and credibility issues or what?" Defense counsel dodged the question and replied, "See the reason I was bringing it up to begin was because she said --." The discussion then turned into a debate between the attorneys concerning whether the complainant actually suffers from schizophrenia. Clearly, defendant had no expert lined up on the issue or on whether the medications would impair her ability to perceive events, assuming that the medications were even being taken at the time of the sexual assault.[3]

In sum, I see no basis in the record to reverse on the issue, nor a sound basis to remand for further inquiry and development of the issue, given defendant's initial handling of the matter. Therefore, I respectfully dissent.

/s/ William B. Murphy

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[1] An offer of proof is "[a] presentation of evidence for the record (but outside the jury's presence)." Black's Law Dictionary (7ed).

[2] In the bench conference, the prosecutor stated that the complainant had "not been diagnosed with schizophrenia." I also believe that it is speculative for the majority to resort to general information outside the record, a desk reference book, regarding why the complainant may have been prescribed Clozapine. The complainant testified that she was taking Clozapine and Paxil for panic attacks, and there was no other evidence presented concerning her Clozapine prescription.

[3] I note that defendant has not made an accompanying argument of ineffective assistance of counsel on the issue being addressed.