STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY FARMER,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 178842
LC No. 93-36388-FC

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of guilty but mentally ill of first-degree murder, MCL 750.316; MSA 28.548. Defendant was sentenced to life imprisonment. We affirm.

Defendant first agues that insufficient evidence was presented to find defendant guilty of first-degree murder because the prosecutor failed to show that defendant was legally sane. Defendant contends that because he was legally insane at the time he committed the instant offense, the prosecutor failed to establish that defendant had the requisite specific intent to commit murder. A person is legally insane if as a result of mental illness that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. MCL 768.21a(1); MSA 28.1044(1). A defendant in a criminal proceeding is presumed sane. *People v Savoie*, 419 Mich 118, 126; 349 NW2d 139 (1984). However, once there is any evidence introduced of insanity, the burden of proof is on the prosecution to establish defendant's sanity beyond a reasonable doubt. *Id*. The testimony of lay witnesses may be competent evidence of sanity and may be used to rebut expert testimony of the issue. *People v Murphy*, 416 Mich 453, 465; 331 NW2d 152 (1982).

Conflicting evidence on the issue of defendant's mental capacity was presented at trial. While defendant presented expert testimony opining that defendant was legally insane at the time he committed the instant crime, the prosecutor presented evidence that defendant was not criminally insane when he committed the crime. Viewing the above evidence in the light most favorable to the prosecution, a

rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Because we will not second-guess the jury's determination of witness credibility and reweigh the evidence, we affirm the jury's verdict. *Id*. at 514.

Defendant next claims that he was denied a fair trial through numerous alleged instances of prosecutorial misconduct. Having reviewed defendant's claims, we find that he was not deprived of a fair trial. Defendant first contends that the prosecutor improperly referred to the penalty that defendant would receive if the jury found defendant not guilty. Our review of the record shows that the prosecutor never mentioned the possible penalty defendant could receive if acquitted of the charged crime. Thus, we find this contention of error to be without merit.

Defendant also claims that the prosecutor improperly disparaged defendant by comparing defendant to Adolph Hitler. The record does not support defendant's contention that the prosecutor specifically compared defendant to Hitler. However, even if the prosecutor's comments could be construed as such, any prejudice to defendant was cured by the trial court's instruction to the prosecutor to retract the remark. *People v Allen*, 201 Mich App 98, 104-105; 505 NW2d 869 (1993).

Defendant failed to object to the remaining instances of prosecutorial misconduct. Therefore, our review of the remaining alleged instances of misconduct is limited to whether our failure to review would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We find no miscarriage of justice here because either any possible prejudice could have been cured by a timely instruction from the court, *id*., or, in some instances, the conduct at issue did not amount to misconduct.

Defendant further claims that he was deprived of the effective assistance of counsel due to trial counsel's failure to object to the above instances of alleged prosecutorial misconduct. To show ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id*. Second, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*.

We find that defendant failed to show that there is a reasonable probability that but for counsel's alleged error, the result of his trial would have been different. As noted above, most of the complained-of comments were proper; therefore, any objection by counsel would have been overruled. Furthermore, even if the remarks were improper, they did not rise to a level warranting reversal because sufficient evidence of defendant's sanity was presented. Therefore, defendant is not entitled to a new trial because even if counsel would have objected to the complained-of remarks, the outcome of the trial would not have been different. *Id*.

Defendant claims that the trial court improperly excluded a diagram made by defendant which supported defendant's theory that he was legally insane when he committed the instant crime. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Finding that the diagram was irrelevant, the trial court excluded the evidence. Defendant committed the instant crime in February 1993. The evidence sought to be admitted was a diagram drawn by defendant in August 1994; therefore, the diagram had no relevancy to the issue of whether defendant was insane at the time he committed the crime in 1993. Because the evidence was irrelevant, we find that the trial court did not abuse its discretion in excluding the evidence. *Id*.

Defendant next contends that he was deprived of his right to an impartial jury when the prosecutor used a peremptory challenge to exclude a black person from the jury. We review de novo the issue of whether a prosecutor improperly used a peremptory challenge to exclude a black person from the jury; however, we will give great deference to a trial court's factual determination that the explanation given by the prosecutor was racially neutral. *People v Barker*, 179 Mich App 702, 707; 446 NW2d 549 (1989). We find that the prosecutor's explanation was racially neutral and shows that he did not exercise his peremptory challenge with respect to this juror merely because the juror was black. Thus, defendant is not entitled to a new trial. *Id*. at 706.

Defendant's final contention of error is that he was deprived of a fair trial when a witness improperly remarked that defendant should be shackled. Defendant did not object to the witness' statement at trial; therefore, the issue is unpreserved for appellate review. A plain unpreserved error may not be considered by this Court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). We find that the witness made an unresponsive, volunteered answer to a proper question, which is not a ground for granting a mistrial. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). We also find that defendant was not prejudiced by the remark; therefore, defendant is not entitled to a new trial. *Grant, supra*.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski