STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ROBERT MILLS,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 187556
LC No. 94-007313-FH

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for breaking and entering an occupied dwelling with intent to commit a felony, MCL 750.110; MSA 28.305; larceny over $100, MCL 750.356; MSA 28.588; carrying a concealed weapon, MCL 750.227; MSA 28.424; possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6); and habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced pursuant to the habitual offender conviction to concurrent sentences of eight to twenty-five years on the breaking and entering offense, and five to ten years on the three other convictions. We affirm.

First, defendant contends that the trial court erred in denying him the use of a diminished capacity defense. We disagree. At trial, the court denied defendant's attempts to introduce evidence of defendant's medical history, including suicide attempts, on the ground that the evidence was not relevant. We conclude that the trial court correctly determined that defendant failed to present any evidence to support a diminished capacity defense which would make such background information relevant. The expert testimony defendant relied on established only a defense of intoxication. Diminished capacity is not available where the lack of capacity is brought on by the voluntary consumption of alcohol or controlled substances. MCL 768.21a(2); MSA 28.1044(1)(2); *People* v *Denton*, 138 Mich App 568, 573; 360 NW2d 245 (1984) (holding that the defense of diminished capacity is governed by the statutory guidelines of legal insanity). Therefore, the trial court did not abuse its discretion in excluding evidence of defendant's medical history. *People* v *McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

* Circuit judge, sitting on the Court of Appeals by assignment.

Next, defendant asserts that he was denied a fair trial by the prosecutor's improper comments during rebuttal argument. We disagree. Review of an issue of prosecutorial misconduct is done on a case by case basis. *People* v *Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). This Court examines the pertinent record from the lower court and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People* v *Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *Legrone*, *supra* at 82-83.

Defendant's allegations of prosecutorial misconduct are all based on the following statements made by the prosecutor during the rebuttal portion of his closing argument:

> There are also, obviously, concerns that you have to be aware of in the context of your decision affecting other people. Because other people are involved here and have stakes here, other than [defendant]. Because your decision impacts Mr. Hill because that's his property. How about the right and sanctity that he has in his own home to be free of people breaking in. Not strangers, people that have been in the family. So his rights are on the line in your decision, also.

Defense counsel objected to the statement at the conclusion of the argument and moved for a mistrial. The court denied the motion for mistrial and no curative instruction was requested or given.

On appeal, as at trial, defendant objects to the prosecutor's comments on the grounds that they are an improper appeal to the jury to convict defendant as part of their civic duty. It is improper for a prosecutor to urge jurors to convict a defendant as part of their civic duty because such argument injects issues into the trial which are broader than the guilt or innocence of the defendant. *Bahoda*, *supra* at 267; *People* v *Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

Assuming without deciding that the remarks were improper, the error, if any, was harmless. Whether an error was harmless requires analysis of two factors. *People* v *Williams*, 179 Mich App 15, 19; 445 NW2d 170 (1989). First, whether the error is "so offensive to the maintenance of a sound judicial process that the error can never be regarded as harmless? Second, . . . can this Court declare a belief that the error was harmless beyond a reasonable doubt?" *Williams*, *supra* at 20. The object of the first inquiry is to deter prosecutorial misconduct, while the second inquiry is designed to safeguard the decision-making process. *Id*. If the comment was deliberately injected into the trial, deprived the defendant of a fundamental element of due process, or was particularly inflammatory or persuasive, it is intolerably offensive. *Id*.

In the instant case, we find that the evidence was unquestionably overwhelming. In addition, the prosecution's statement was isolated and not terribly persuasive or inflammatory. Therefore, we conclude that defendant was not denied a fair trial by the prosecution's remarks.

Finally, defendant asserts that he was denied a fair trial on the habitual offender charge due to improper comments by the prosecution during opening statements. We disagree. In his opening statement at the habitual offender trial, the prosecutor made the following remarks:

> Mr. Louisell, as the probation agent for the defendant, has discussed these prior convictions with the defendant and the defendant has admitted these prior convictions. The defendant also has been in court and had a chance to question these prior convictions previously and did not do that, Mr. Louisell will testify to that.

Defendant objected to the statements on the grounds that the statements were not relevant and were untrue. After discussion of the matter, the court granted defendant's request that the jury be instructed that defendant was not required to prove anything. On appeal, defendant claims that the second sentence of the above quoted paragraph is error requiring reversal in that it violated his right to remain silent.

Appellate review of allegedly improper remarks made by the prosecution is precluded if the defendant fails to make a timely and specific objection to the comments. Further, appellate review is foreclosed where the defendant objected on one ground at trial, but bases his appellate argument on a different ground. An exception to this rule is where a curative instruction could not have cured the prejudicial effect or if the failure to review the issue would result in manifest injustice. *People* v *Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People* v *Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

We conclude that defendant did not specifically object to the prosecutor's comments on the grounds he now asserts on appeal. Therefore, he has failed to preserve this issue for review. *Nantelle*, *supra* at 86-87. In any event, even if the remarks were an improper comment on the defendant's right to remain silent, the error, if any, was harmless. In light of the overwhelming evidence of defendant's guilt, the isolated nature of the comments, and the fact that the statements were not particularly inflammatory or persuasive, we find that any resulting prejudice was harmless.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry