

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BURT R. LANCASTER,

Defendant-Appellant.

UNPUBLISHED

June 23, 1998

No. 184033

Oakland Circuit Court

LC No. 93-127632 FC

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and life in prison without parole for the murder conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor failed to present sufficient evidence to prove that he was sane when he committed the offense. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

A defendant in a criminal proceeding is presumed sane. Once any evidence of insanity is introduced, however, the prosecution bears the burden of establishing defendant's sanity beyond a reasonable doubt.¹ *People v John*, 129 Mich App 664, 666; 341 NW2d 861 (1983). While a mentally ill criminal defendant is insane if he lacks substantial capacity to appreciate the wrongfulness of his conduct *or* to conform his conduct to the requirements of the law, *People v Sorna*, 88 Mich App 351, 360; 276 NW2d 892 (1979), he is sane only if he possesses substantial capacity to appreciate the wrongfulness of his conduct *and* to conform his conduct to the requirements of the law, *People v*

Foster, 138 Mich App 734, 737; 367 NW2d 349 (1984). The nature and quantum of rebuttal evidence of sanity sufficient to present an issue for the trier of fact is to some extent determined by the strength of the insanity evidence. *John*, *supra*. Merely some evidence of sanity may be sufficient to meet some evidence of insanity, but may be wholly insufficient to meet substantial evidence of insanity. *Id.* While testimony of lay witnesses may be competent evidence of sanity, the fact that the witness did not observe any abnormal acts is of slight value unless the witness had prolonged an intimate contact with the defendant. *People v Murphy*, 416 Mich 453, 465-466; 331 NW2d 152 (1982).

We find that there was sufficient evidence to create an issue of fact as to whether defendant was mentally ill at the time of the offense and, even if so, whether he was nonetheless sane at the time he committed the offense.

Defendant next contends that the prosecutor improperly introduced evidence that he exercised his right to remain silent after being advised of his *Miranda*² rights. Even if defendant is correct, see *People v Westbrook*, 175 Mich App 435, 440; 438 NW2d 300 (1989), given that the issue has not been preserved for appeal due to defendant's failure to object below, that the prosecutor only elicited the allegedly improper testimony once and did not raise it in closing argument, that defendant elicited the same testimony from another witness, and that the evidence was irrelevant to the issue of sanity, we find that any error was harmless, *People v Belanger*, 454 Mich 571, 576; 563 NW2d 665 (1997).

Defendant next contends that he was denied effective assistance of counsel. Because defendant did not raise this issue below, review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish that defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *Id.* The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Having reviewed the record in light of this standard, we find that a claim of ineffective assistance of counsel has not been established.

Defendant next argues that the court erred in allowing the prosecutor to peremptorily dismiss a black juror. We disagree.

A prosecutor cannot use peremptory challenges to strike blacks from a jury, where the defendant is also black, simply because of race. *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989), affirmed in part on another ground 437 Mich 161 (1991). The burden initially falls upon the defendant to make out a prima facie case of purposeful discrimination. *Id.*

To establish a prima facie case, a defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race, and that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to

exclude the veniremen from the petit jury on account of their race. . . . In deciding whether the defendant has made the requisite showing, the trial court must consider all relevant circumstances, including whether there is a pattern of strikes against black jurors and the questions and statements by the prosecutor during voir dire and in exercising his challenges, all of which may support or refute an inference of discriminatory purpose. [*Id.* at 705-706 (citations omitted).]

In this case, we agree that there was no prima facie showing of purposeful discrimination. See *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Accordingly, we find no error in the trial court's ruling.

Defendant next contends that he was denied a fair trial because of prosecutorial misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because defendant did not raise the proper objections at trial, this Court will only reverse if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in manifest injustice. *Stanaway, supra* at 687.

Assuming that the prosecutor made an improper appeal to the jury's sympathy, *People v Modelski*, 164 Mich App 337, 347; 416 NW2d 708 (1987), or argued facts not in evidence when attacking the credibility of defendant's expert, *People v Thomas Miller*, 182 Mich App 482, 486; 453 NW2d 269 (1990), we find that the trial court's instructions to the jury were sufficient to dispel any prejudice resulting from the isolated remarks, *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Defendant's remaining contentions regarding prosecutorial misconduct are without merit. Accordingly, we conclude that a failure to review the issue would not result in a miscarriage of justice.

Defendant next argues that the trial court erred when it gave CJI2d 6.21. Although the instructions given by the trial court correctly state the law, defendant contends that the law regarding circumstantial evidence of intent does not apply when a diminished capacity defense has been raised. Because defendant has failed to cite any authority in support of this contention, we deem the issue waived. *People v Peña*, 224 Mich App 650, 664; 569 NW2d 871 (1997).

Defendant next argues that the trial court erred in allowing the prosecutor's expert witness to testify regarding defendant's mental condition based on speculation and conjecture. Because defendant did not object at trial on the ground asserted on appeal, appellate review of this issue is precluded absent a showing of manifest injustice. *People v Welch*, 226 Mich App 461, 464; ___ NW2d ___ (1997); *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993). The record reveals that the witness' opinion that defendant may not have been suffering from a mental illness was based on facts and observations, not speculation. Further, the witness unequivocally testified that even if defendant was mentally ill at the time of the offense, he was not legally insane. Therefore, we find no error.

Defendant finally contends that the cumulative effect of numerous errors deprived him of a fair trial. Although one error in a case may not necessarily provide a basis for reversal, it is possible that the

cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988). The test to determine whether reversal is required is not whether there were some irregularities, but whether defendant had a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). Our review of the record leads us to conclude that defendant received a fair trial.

Affirmed.

/s/ David H. Sawyer

/s/ Michael J. Kelly

/s/ Michael R. Smolenski

¹ The insanity statute, MCL 768.21a; MSA 28.1044(1), was amended a month prior to the trial. Aside from slightly changing the definition of insanity, it specifies that the burden of proof is on the defendant to prove insanity by a preponderance of the evidence. The trial court elected to apply the old statute and instructed the jury accordingly. That ruling is not at issue here.

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).