STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN PAUL HANNA,

Defendant-Appellant.

UNPUBLISHED
November 27, 2001

No. 221555
Chippewa Circuit Court
LC No. 99-006708-FC

Before: Sawyer, P.J., and Smolenksi and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Nathan Hanna of first-degree premeditated murder,[1] and possession of a firearm during the commission of a felony,[2] returning a verdict of "guilty but mentally ill"[3] after Hanna asserted an insanity defense. The trial court sentenced Hanna to consecutive terms of imprisonment of two years for the felony firearm conviction and life without parole for the murder conviction. Hanna appeals as of right. We affirm.

I. Basic Facts And Procedural History

A. The Killing And Hanna's Arrest

On July 23, 1998, Hanna, a motor route driver for the *Evening News* in Sault Ste. Marie, calmly approached Anthony Gillespie, an employee of the paper, and shot him twice with a shotgun, killing him. Hanna allegedly believed Gillespie to be the Anti-Christ and that the deity had instructed him to kill Gillespie in order to save the world. After he shot and killed Gillespie, Hanna hid in the woods for three days before the police apprehended him after a shootout, in which he was wounded in his side, stomach and leg.

[1] MCL 750.316(1)(a).

[2] MCL 750.227b.

[3] As authorized by MCL 768.36.

B. Hanna's Statements

(1) Hanna's Statement Of July 28, 1998, To Detectives Whitney And Price

At a *Walker*[4] hearing on Hanna's motion to suppress several statements that he gave to the police after hospital treatment for his wounds, Detective Michael Whitney identified himself as a detective with the Sault Ste. Marie Police Department and as chief investigator of the shooting. According to Detective Whitney, he and Detective Price spoke with Hanna before noon on the July 28, 1998. The conversation was taped. Detective Whitney did not know how long Hanna had been out of surgery or what medicines he may have been taking, but described his speech as "intelligible" and "coherent," despite his breathing being more audible than his speech. Detective Whitney stated that he informed Hanna of his *Miranda*[5] rights, and asked him, sentence by sentence, if he understood them and that Hanna replied, sentence by sentence, that he chose to waive his rights. Detective Whitney added that Hanna greeted him with an ordinary hello, and responded appropriately to his questions, sometimes elaborating on his own initiative. According to Detective Whitney, "Some of the text of his responses I would say were unusual as far as the statements he was making with the information given, but the condition he was in while he was speaking was very calm, very rational." Detective Whitney added that Hanna said that he had had nothing to eat or drink while in the woods for three days.

(2) Hanna's Statement On July 28, 1998, To Detective Sexton

Detective Robin Sexton, of the Michigan State Police, testified to meeting Hanna at around noon on July 28, 1998, while investigating the shoot-out between him and the local police. According to Detective Sexton, he advised Hanna of his *Miranda*[6] rights but Hanna agreed to waive those rights and talk. Detective Sexton recorded the interview and turned copies over to the parties. Detective Sexton stated that Hanna was uncomfortable because of his wounds, but "appeared coherent and able to talk." Detective Sexton stated that he did not know if an attorney had been appointed for Hanna at that moment, but learned of Hanna's lawyer about fifteen minutes into the conversation with Hanna. Detective Sexton testified that he allowed Hanna to talk to counsel alone for a moment, after which Hanna stated that he did not wish to continue speaking.

(3) The Trial Court's Ruling

After hearing other testimony and listening to the taped statement, the trial court denied Hanna's motion to suppress his statements. The trial court stated:

> Now, proceeding on the premises that a knowing, intelligent waiver is required in a situation where there is a confession, there is the question that it was voluntary. There is no evidence of impermissible police conduct. This Court

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[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

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

[6] *Miranda, supra.*

would find the defendant, Nathan Hanna, sufficiently understood his rights and that he could and he did provide a valid waiver.

* * *

Now, the defendant does not contend that the confession was involuntary. The testimony at the suppression hearing clearly indicates a lack of coercion surrounding his confession. On the tape the defendant stated he wanted to tell the police what happened and that he did tell them. The defendant is not claiming that this was an involuntary statement.

Given the defendant's confession was voluntary, the inquiry is the degree of understanding the accused must possess in order to provide a knowing, intelligent waiver of the Miranda afforded right . . . .

And to establish it is a valid waiver there must be sufficient evidence to demonstration [sic] the accused understood that he did not have to speak, that he had the right to have the presence of counsel, and the state could use what he said later at a trial against him . . . .

Now, the defendant obviously was informed of the right and it is undisputed the police officers who investigated administered the required warning and they sought to insure the defendant understood each warning by inquiring after each warning whether he understood what [sic] warning. The defendant did answer he did after each warning was given. The tape of the interview established that the defendant did not ask questions about any . . . rights given to him, nor did the officers have any trouble communicating with the defendant. There is no evidence that at the time of the warnings with the defendant or during subsequent questioning that the defendant manifested, expressly or by implication from his words or actions, any lack of comprehension of what was said to him or what was occurring at the time of the interview.

It is also established that the defendant gave appropriate background information, including his name, the name of his wife, the number of his children by a prior marriage, and the number of children of his wife's by prior marriage, his address, his date of birth, location of the custodial interrogation . . . . Also, the defendant answered all the questions put to him without ever indicating he didn't understand what was being asked.

The record also indicates that the defendant knew the police intended to use the statement against him. The defendant had been arrested on open murder and felony firearm prior to this, at the time he was actively engaged in a confrontation with the police in which the defendant was shot several times. Further, he was in custody at War Memorial Hospital where a deputy was on guard 24 hours a day. Also, the defendant, during the interview, stated that he knew his actions against the deceased were illegal. Therefore, there is sufficient evidence to conclude the defendant understood his relationship with the police.

* * *

Although basically it could be agreed the fact the defendant acted out the attack on the deceased is irrational, the answers to the questions initiated by the police were responsive, appropriate. He spoke in a coherent manner, even logical manner based on the fact he was delusional. And per what was stated about the attack on the deceased, the mood and affect were appropriate, congruent to the circumstances of the interview, oriented to . . . person and place, and personal relation to reality . . . .

* * *

. . . [T]he Court would also turn to one other issue that the defendant has raised and that is the issue that during the second interview with . . . Detective Robin Sexton, that prior to that [defense counsel] had filed an appearance as attorney of record. Sergeant Sexton, obviously, did not know that at the time of this interview, meaning the beginning of the afternoon. [Defense counsel] was appointed and had filed an appearance earlier during the day, and at that time she did come to the hospital on the day in question and noticed Detective Sexton was interviewing [defendant] and spoke to the sheriff's deputy outside, insisted she be allowed in, and there was some confusion there at the time, and eventually she entered the room and indicated she was the attorney of record and so informed Detective Sexton and [Hanna].

Now . . . where the defendant's statement is voluntary, failure to inform a person that counsel has already been contacted may violate the Michigan Constitution because it precludes making a knowing and voluntary waiver of right to counsel.

But in this case, the police did not fail to inform [Hanna] that he had counsel appointed for him. The officers at the hospital weren't aware of that. Although [defense counsel] informed the Sheriff somewhat earlier than that, he did not communicate that, I take it, directly to the police. They did not know. The interview had just started taking place when [defendant] was informed that she was the attorney. Detective Sexton at that time in the interview asked if he wished to proceed and [defense counsel] indicated he did not wish to proceed and therefore, the interview was terminated.

So in this case the Court would rule the statement was voluntary. Under this set of circumstances the police did not overstep the boundary failing to inform [Hanna] that counsel had been appointed. So accordingly, the State really fulfilled sufficient understanding of the Miranda warnings given, and the subsequent waiver was valid.

C. The Trial

(1) The Case Against Hanna

Richard Beadle, advertising manager for the *Evening News*, testified at trial that Hanna was a subcontractor for the paper, "a motor route driver." According to Beadle, at approximately 9:15 a.m. on July 23, 1998, Hanna stopped at Gillespie's desk, carrying a shotgun. Asked if he had been nervous to see the shotgun, Beadle replied, "No. But at the same time [Hanna] disarmed me emotionally by the way he brought in this gun and the small talk. There was no indication prior to the gunshot going off." Beadle recounted initially thinking that Hanna was showing a new gun to Gillespie, and that there was no indication of "a problem" or "any emotional turmoil whatsoever." Beadle stated that, shortly thereafter, he heard a shot, and turned to see Gillespie falling and Hanna holding the shotgun. Beadle testified that Gillespie had obviously been shot in the face. Beadle further recounted that Hanna raised the gun and shot Gillespie a second time. According to Beadle, Hanna then looked at him and another employee, and "walked out toward the front of the building very slowly and deliberately."

Another employee of the *Evening News* who witnessed the shooting testified that, initially, "[t]here was no raised voices. [Hanna] actually looked like he was laughing a couple of times as they were talking." The publisher of the *Evening New* told of his brief contact with defendant on the morning in question:

> At approximately a quarter to 9:00 or so [defendant] was in my office. We had gotten in new vending machines and were discussing where to place the new vending machines, where the old ones were going, and some distribution problems we had had. He left my office. I . . . turned on my computer . . . and maybe five minutes later I heard a shotgun blast.

Detective Whitney again testified and stated that he was chief investigator of homicide. Detective Whitney stated that Hanna arrived at War Memorial Hospital by ambulance on July 26, 1998, and that he interviewed Hanna on the morning of July 28, 1998. Detective Whitney testified that the interview was recorded and the tape was played for the jury. On the tape, when asked about the incident at the *Evening News*, Hanna replied as follows:

> [I]t actually started back to about a year . . . and three months ago. I got into Amway and I listened to their tapes and it was telling about bondage and slavery going on in the United States and different countries.
>
> * * *
>
> They were saying, like I said, bondage and putting people in slavery and for sexual — people getting — okay, and then they loaded up and then they would get in debt to these people and then they would turn around and these people would take them over to a place across the sea where the main islands are over there. Then once they got them over there they had no rights as a citizen of the United States so they — then they turned them into bond slaves. Then they came back here. There are people back here that was already set up that if they got out

> of line or something they would work like the Mafia and they kill them if they didn't do what they did.

On the tape, Hanna described himself and Gillespie as "real close friends," but explained that a "revelation from God told me that Tony [Gillespie] was the Anti-Christ," adding, "That means . . . he is the one that is coming to this earth to — to bring tribulation to the earth." Hanna explained that this was something evil, and that "I had dreams at night about it and I read it in the Bible and Jesus, the name Jesus. He is the Anti-Christ. Jesus is the Anti-Christ." Later on the tape, Hanna stated, "Tony . . . was my boss. Man, this guy gave me good money, good pay, and everything else. But it came down he was the Anti-Christ and he had to go or it is coming this way. I mean it is already happening down south." Asked what would have happened had Gillespie lived, Hanna replied,

> What is coming now. I see in my visions that right now the women are getting in control and what happens is they are killing off the white men and after they kill off all the white men, mainly the Indians and blacks and they teach you this in the church, they are just killing off the white men and women. The blacks come over from Africa and cannibals and stuff like that and they sneaked over here and are making their way up to the United States.

On the tape, Hanna continued that when he confronted Gillespie, he asked, "Tony, do you got that list?," meaning "[f]or his bond slaves," to which Gillespie replied in the negative. Hanna then stated, "After that I said I think it is my judgment day and I shot him." Hanna admitted that he shot Gillespie with the intent to kill, explaining, "I figured a transformation would come and seven thousand of the lost spirits would die automatically that are holding these people in this slavery stuff."

On the tape, Hanna stated that he then drove to an underpass bridge, stayed there about twenty minutes, then "went out of town towards Five Mile, Five and a Half Mile." Asked if he thought what he had done was wrong, Hanna replied, "I really can't say because . . . to me it was a revelation from God. I am serious." Asked if he knew his actions to be illegal, Hanna replied, "Oh, yeah, definitely." Hanna said that after parking his truck that Thursday morning he "took off running," into the woods, where he slept on the ground and had nothing to eat or drink for three days. Hanna stated that he was waiting for a revelation from God and then, in reliance on certain Biblical language, left the woods and headed homeward. Hanna stated that, "You know how Jesus would walk through the crowd and the Jews he was close to visibly, like and he could walk through the crowd."

(2) Hanna's Defense

At trial, Hanna did not dispute that he shot Gillespie with the intent to kill him, but instead asserted the defense of insanity. A staff psychiatrist at Marquette General Hospital, after being qualified as an expert in the field of psychiatry, stated that the original diagnosis was "psychosis affective disorder." Another psychiatrist at Marquette General, who was also qualified as an expert in psychiatry, testified that Hanna was "definitely psychotic" meaning "very delusional." A third expert, who was a licensed clinical psychologist and certified forensic

examiner, testified that, "I thought [Hanna] was not sane. I thought he was legally insane, I thought, by the Michigan State criteria for being found insane."

(3) The Prosecutor's Rebuttal

For rebuttal witnesses to the insanity defense, the prosecutor presented the victim's three sons. Nicholas Gillespie testified that he had been acquainted with Hanna in July of 1998 and characterized him as a reliable motor carrier for the paper. Nicholas Gillespie recounted that he typically saw Hanna four days out of five, and that he sometimes had "small chit chat" with him.

Dominic Gillespie testified that the previous July he was employed at the *Evening News*. According to Dominic Gillespie, he became acquainted with Hanna at work, and conversed with him nearly every work day. Dominic Gillespie stated that he found nothing extremely unusual about his conversations with Hanna, adding that the subject of religion once came up, but that was just "idle chit chat about the Bible and stuff," involving no arguments. Dominic testified that he did not recall his father ever expressing any dissatisfaction with Hanna and that Hanna consistently reported to work. According to Dominic Gillespie, Hanna never exhibited aggressive or hostile behavior. Asked if anything about Hanna's behavior seemed alarming, Dominic replied, "No, he seemed normal."

Anthony Gillespie testified the he too worked at the *Evening News* in July of 1998, and was acquainted with Hanna, having conversations with him most days at work. According to Anthony Gillespie, the subject of the Bible occasionally arose, engendering friendly disagreement. Anthony Gillespie testified that nothing in his conversations with Hanna caused him any alarm or reason to worry and that Hanna appeared normal, if opinionated. Anthony Gillespie agreed that Hanna had demonstrated no aggression.

(4) The Verdict And Post-Trial Motions

The jury rejected Hanna's insanity defense and instead found him guilty but mentally ill. Thereafter, the trial court denied Hanna's motions for a directed verdict or judgment notwithstanding the verdict and motion for new trial.

II. The Guilty But Mentally Ill Statute

The guilty but mentally ill statute, reads, in pertinent part, as follows:

> (1) If the defendant asserts a defense of insanity . . . 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 that offense.

* * *

> (3) If a defendant is found guilty but mentally ill . . . the court shall impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense.[7]

Essentially, therefore, the statute provides that a verdict of guilty but mentally ill carries the same result as a verdict simply of guilty. By contrast, a verdict of not guilty by reason of insanity would relieve a defendant of all criminal responsibility.[8]

III. Waiver of *Miranda* Rights

A. Standard Of Review

Hanna asserts that the trial court erred by refusing to suppress his statements to the police. He sought to suppress these statements at the *Walker*[9] hearing, thus preserving this issue for appellate review. "An appellate court must give deference to the trial court's findings at a suppression hearing. Although engaging in de novo review of the entire record, [the reviewing court] will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that ruling is found to be clearly erroneous."[10]

B. Standards For Waivers

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights."[11] "Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda*[12] rights. Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation."[13] "The state has the burden of proving by a preponderance of the evidence that the suspect validly waived his or her rights."[14]

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[7] MCL 768.36.

[8] See *People v Ramsey*, 422 Mich 500, 512; 375 NW2d 297.

[9] *Walker (On Rehearing), supra*.

[10] *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996) (Boyle, J., joined by Brickley, C.J., and Riley, J., and in pertinent party by Weaver, J.) (citations and internal quotation marks omitted).

[11] *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[12] *Miranda*, *supra*.

[13] *People v Abraham*, 234 Mich App 640, 644-645; 599 NW2d 736 (1999), citing *Howard*, *supra* at 538, and *Fare v Michael C*, 442 US 707, 724-725; 99 S Ct 2560, 2571-2572; 61 L Ed 2d 197 (1979).

[14] *Id.* citing *Cheatham*, *supra* at 27.

C. Voluntary Waivers

"While the voluntariness prong of the inquiry is determined solely by examining police conduct, a statement made pursuant to police questioning may be suppressed in the absence of police coercion if the defendant was incapable of knowingly and intelligently waiving his constitutional rights."[15] Here, the trial court noted, and the record shows, that there was no police misconduct and Hanna did not allege below that his statements were involuntary. On appeal, however, Hanna points to evidence that a nurse attending to him had made a note stating, "Further pain medication held per request of the detective to facilitate communication." Hanna characterizes this as indicating that the police threatened to withhold pain medication as an interrogation tactic.

Hanna concedes that this evidence does not show that Hanna was aware of any such request by the police. Indeed, we observe that a reading of the nurse's note to suggest that Hanna confessed because he expected pain medicine to be his reward for doing so is highly speculative. There is a less troubling explanation for the detective's request: that the detective asked that Hanna not be sedated to the point where he could no longer listen and speak coherently. For that reason, and because Hanna did not raise the matter until a post-trial motion, we affirm the trial court's conclusion that Hanna's confessions to the police were voluntary.

D. Knowing And Intelligent Waivers

Hanna argues that his mental illness, along with the circumstances of the interviews, precluded him from knowingly and intelligently waiving his rights. He asserts that those circumstances were that he was recently out of surgery, that he was heavily medicated, that he was shackled to his hospital bed, that he was connected to a nasal/gastric tube, and that he had not consumed food or water for over three days. However, we observe that these circumstances establish a question of fact concerning whether defendant knowingly and intelligently waived his rights, not a legal conclusion as to such a waiver.

Although mental illness is a factor to consider when deciding whether a suspect knowingly and intelligently waived *Miranda* rights, only in an extreme case does that fact alone decide the issue:

> Conceding that there is a level of mental deficiency so severe that under no circumstances would a defendant be able to knowingly waive his rights, we observe that short of this level of incapacity, a defendant's mental ability of necessity must be only one factor in the "totality of circumstances" inquiry. To hold otherwise would effectively immunize the mentally limited from interrogation and preclude the socially beneficial use of confessions, despite the absence of any indications of overreaching by the police.[16]

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[15] *Howard, supra* at 538.

[16] *Cheatham, supra* at 43 (Boyle, J., joined by Brickley, C.J., and Riley, J., and in pertinent part by Weaver, J.) (citation omitted).

As the trial court noted, a suspect need not have a legally sophisticated understanding of the nuances of this area of the law to give a knowing and intelligent waiver of *Miranda* rights.[17] Instead, to establish a valid waiver of *Miranda* rights, the prosecution need only show that the suspect understood that he or she did not have to speak, that the suspect had the right to have an attorney present during questioning, and that any statements given could be used against the suspect at trial.[18] The fact that a jury found Hanna to be guilty but mentally ill does not, in and of itself, mean that he could not knowing and intelligently waive his *Miranda* rights.

Here, all indications are that Hanna spoke appropriately and coherently, not only indicating that he was aware of his circumstances and whereabouts, but stating his understanding, and decision to waive, each of his specific *Miranda* rights. According to the evidence, Hanna was calm and rational, despite revealing very peculiar – and rather irrational – religious beliefs. Further, the trial court listened to the recordings of the interviews and we are obligated to defer to that trier of fact's superior ability to weigh evidence and assess credibility.[19] From this record, we conclude that there was a reasonable evidentiary basis for the trial court's finding that Hanna understood that he had the right to remain silent, that he was entitled to have a lawyer present during questioning, and that anything he said could be used against him at trial.

Concerning Hanna's lack of food or water, we observe that this deprivation was a consequence of his decision to go into hiding after his crime. Although Hanna now wishes to imply that he was further deprived of nutrition and hydration while in the hospital, this belated allegation – that hospital personnel chose to withhold these necessities – strains credulity. Further, the presence of the nasal/gastric tube indicates, rather obviously, that Hanna was receiving nourishment through that mechanism. Thus, a consideration of the circumstances surrounding Hanna's confessions does not require any presumption that he was deprived of food or water at the time.

E. Right To Counsel

Hanna argues that the police conducted the second of his interviews in violation of his right to counsel as guaranteed by our state constitution, which demands that the police advise a suspect when a lawyer is at hand to assist with the decision when that suspect is deciding whether to waive his or her *Miranda* rights.[20] Citing *People v Bender*, Hanna argues that the trial court erred in finding that the police legally could, and purposefully did, fail to reveal to one another that he was represented by counsel. We conclude that Hanna misreads both *Bender* and the record below.

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[17] See *Abraham, supra* at 652, n 7.

[18] *Abraham, supra* at 647, citing *Cheatham, supra* at 29 (Boyle, J., joined by Brickley, C.J., and Riley, J., and in pertinent party by Weaver, J.).

[19] See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

[20] *People v Bender*, 452 Mich 594, 611; 551 NW2d 71 (1996), citing Const 1963, art 1, § 20.

The trial court did not find that the police purposefully failed to reveal that counsel was appointed but, instead, concluded only that Hanna's lawyer informed the county sheriff that she represented Hanna and that the sheriff in turn did not immediately inform the police detectives who were interviewing Hanna at the hospital. *Bender* does not suggest that if any one peace officer knows that a suspect has a lawyer, that knowledge is imputed to all other peace officers. Because Hanna points to no evidence that the county sheriff deliberately withheld the information concerning the existence of his attorney and because there is no factual or legal basis for suggesting that the sheriff's knowledge that he had a lawyer should be immediately imputed to a detective with the State Police, we conclude that Hanna has failed to demonstrate that he suffered any deprivation of the constitutional right to counsel.

IV. Notice of Rebuttal Witnesses

A. Standard Of Review

Hanna argues that the trial court abused its discretion in allowing the prosecutor to present three lay witnesses, Gillespie's sons,[21] in rebuttal of the insanity defense, where the prosecutor included their names on the main witness list but did not notice them separately as rebuttal witnesses in accordance with the statute that governs rebuttal of the insanity defense. Defense counsel objected to the presentation of the rebuttal witnesses, on ground of deficient notice, thus preserving this issue for appellate review. The decision whether to admit evidence is within the trial court's discretion and we review it on appeal for an abuse of discretion.[22]

B. MCL 768.20a(7)

MCL 768.20a(7) provides as follows:

> Within 10 days after the receipt of the report from the center for forensic psychiatry or from the qualified personnel, or within 10 days after the receipt of the report of an independent examiner secured by the prosecution, whichever occurs later, but not later than 5 days before the trial of the case, or at such other time as the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal of the defense of insanity which shall contain the names of the witnesses whom the prosecuting attorney proposes to call in rebuttal.

C. The Trial Court's Ruling

Here, when defense counsel objected to the prosecutor's presentation of any rebuttal of the insanity defense for lack of statutory notice, the trial court ruled as follows:

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[21]Lay testimony, where the defense is insanity is before the court, is relevant on that issue and the weight of such testimony is for the trier of fact. *People v Word*, 67 Mich App 663, 667; 242 NW2d 471 (1976).

[22] *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

> Well, obviously the purpose of that is notice to who was coming so you have an opportunity to prepare for the witnesses who are called in this case. I believe there has been sufficient notice members of the Gillespie family would be called so the Court would deny the motion and allow the prosecution to take their testimony.

D. Procedures And Remedies

We conclude that the trial court's ruling was sound. MCL 768.20a(7) establishes procedural rules for rebutting an insanity defense, but does not set forth a remedy for failure to follow its particulars. The matter is thus left to the trial court's discretion. An abuse of discretion occurs only where a court's action is "so violative of fact and logic as to constitute perversity of will or defiance of judgment . . . ."[23]

Hanna's position on appeal is that lack of notice resulted in the defense failing to present expert testimony concerning how legally insane persons might appear normal to laypersons in casual settings. Hanna further asserts that defense counsel was not, therefore, prepared to cross-examine the rebuttal witnesses, specifically on the issue of Hanna's sanity. However, as an initial matter, we note that the record indicates that the defense objected to any presentation of rebuttal *before* the prosecutor took any steps in that direction, thus indicating that the defense was not wholly surprised by the fact that the prosecutor proposed to offer rebuttal testimony. Additionally, the trial court specifically asked defense counsel if she had any surrebuttal, but counsel declined. Had defense counsel been at any disadvantage because of any actual surprise, she was free to seize the opportunity to bring or recall witnesses or request an adjournment to prepare to answer the rebuttal evidence. Defense counsel's disinclination to take these actions suggests that she saw no advantage in doing so and thus suffered no unfair disadvantage from any surprise of the moment.

Hanna argues that his defense counsel would have elicited expert testimony to the effect that sometimes insane persons appear normal to laypersons. However, the defense did present testimony from its main expert that "it's not that [Hanna] was so deteriorated that he couldn't act in a coherent fashion in some areas." To automatically disallow a witness because of a failure to notice that witness according to the particulars of MCL 768.20a(7), where the prosecutor listed the names of the witnesses on the main witness list and the trial court indicated that there had been sufficient notice that members of the Gillespie family would be called, would be to elevate form over substance. We conclude that there was no defiance of judgment, or perversity of will, in the trial court's decision to allow the rebuttal witnesses, despite their not having been listed and noticed a second time in rigid adherence to MCL 768.20a(7).

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[23] *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996) (internal quotation marks and citation omitted).

V. Prosecutorial Misconduct

A. Standard Of Review

Hanna asserts a number of instances of alleged prosecutorial misconduct. We review a trial court's evidentiary decisions for an abuse of discretion.[24] With respect to issues of prosecutorial misconduct, this Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair trial.[25] However, "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."[26]

B. Hanna's Silence

Hanna asserts that the prosecutor improperly elicited from a police detective that Hanna had elected to stop talking to the police once his lawyer arrived and so advised him. The decision whether to admit evidence is within the trial court's discretion and we review it on appeal for an abuse of discretion.[27] However, because this issue was not raised below, our review is limited to avoiding manifest injustice.[28]

It is well established that a defendant's silence may not be used as substantive evidence of guilt.[29] Here, however, the question of whether Hanna shot and killed the victim was not at issue; there is no question that he did, in broad daylight in front of several witnesses. Further, the evidence that the prosecutor elicited concerned *why* the second police interview stopped. Detective Sexton's testimony specifically attributed the decision to terminate the interview to the appearance of defense counsel. It is a strained reading of these events that suggests that the jury inferred Hanna's guilt from his subsequent silence. Had there been an objection, any prejudice Hanna may have suffered in the event could readily have been remedied by a curative instruction.[30] Because Hanna's identity as the killer was not at issue and his cooperation with defense counsel in declining to speak further to the police bears only tangentially on the defense theory of insanity, we conclude that no manifest injustice resulted and that this incident warrants no appellate relief.

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[24] *People v Bahoda*, supra at 288.

[25] *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996).

[26] *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[27] *Bahoda, supra*, 448 Mich at 288.

[28] See *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992).

[29] *People v Bobo*, 390 Mich 355, 361; 212 NW2d 190 (1973).

[30] *Launsburry, supra* at 361.

C. The Prosecutor's Remarks In Rebuttal Argument

Hanna points to certain remarks the prosecutor included in rebuttal arguments, asserting that the prosecutor improperly denigrated the insanity defense and urged the jury to nullify that defense despite its applicability in this case. In her argument, the prosecutor stated:

> Members of the jury, I think you, me and everyone else have to be careful when we are called upon to deal with this situation. We do not want to create a ready avenue of escape for a person who does a dastardly deed and kills another human being via the reason of insanity because you enjoy some beliefs you think you have so therefore that puts me home free for whatever I do.
>
> The word we are really speaking about is responsibility . . . . I don't think we can allow fixations of the mind to allow anyone to destroy another person and to be excused by reason of saying they're insane.

There was no objection to this argument. "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."[31]

Where the issue at trial is the insanity defense, the question before the jury is that of the defendant's sanity or insanity at the time of the crime, not the possibility or even probability that an accused will in the future commit some other criminal act.[32] Thus, inflammatory argument suggesting that a wrongdoer may go free and "to go out and shoot somebody else", warrants reversal even if there was no objection.[33] However, although the remarks about which Hanna complains did suggest that Hanna hoped to escape responsibility for his conduct through the insanity defense, the prosecutor did not suggest that the jury should eschew that verdict in order that Hanna not be allowed to kill again. This is distinguishable from *People v Lewis*, in that *Lewis* involved extensive argument concerning the penal ramifications of the various verdicts.[34] Here the prosecutor, at worst, only glanced off such an argument. Although a curative instruction could not have remedied the prejudice in *Lewis*, one in this case would have cured any prejudice stemming from the prosecutor's remarks.

Further, the trial court did provide the customary instruction, "Possible penalty should not influence your decision," and we presume that juries follow their instructions. Such a result squares with respect for juries.[35] Additionally, a trial court may cure improper civic-duty

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[31] *Launsburry, supra* at 361.

[32] *People v Lewis*, 37 Mich App 548, 553; 195 NW2d 30 (1972).

[33] *Id.* at 554.

[34] *Id.* at 549-552.

[35] *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998).

arguments when it instructs the jury that arguments of counsel are not evidence.[36] Here, the trial court specifically so instructed the jury.

D. Jury Sympathy For The Victim

Hanna argues that the prosecutor improperly appealed to juror sympathy during closing arguments. He targets the following remarks by the prosecutor:

> It's, as I say, just so sad it's hard to really deal with it. Doubly sad at this time of year when the nation just finished celebrating a recognized holiday called Father's Day. The Gillespies unfortunately did not have the luxury of an enjoyable Father's Day with husband and father.

After the jury was excused, defense counsel objected and requested a curative instruction. Our task on appeal is to evaluate the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial.[37]

A prosecutor may not urge a jury to convict out of sympathy for the victim.[38] Even so, however, a prosecutor need not confine argument to the "'blandest of all possible terms.'"[39] In this case, the mention of Father's Day was certainly gratuitous and may have been calculated to arouse juror sympathy. However, the trial court's instruction to the jury, "You must not let sympathy or prejudice influence your decision," cured any prejudice. Under these circumstances, we conclude that the mention of Father's Day could not have so moved the jury that it chose to skew its reading of the evidence in the direction of conviction for that reason.

VI. Evidence of Insanity

A. Standard Of Review

Hanna moved the trial court for a directed verdict, and for a new trial, on the grounds that the evidence of his insanity was strong and that the prosecutor failed to rebut it. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.[40] "The standard of appellate review

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[36] *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

[37] *Truong (After Remand) supra* at, 336, citing *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

[38] See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988), and *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

[39] *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

[40] *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999), citing *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

regarding a trial judge's decision to grant or deny a motion for a new trial is 'entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion . . . .'"[41]

B. Overcoming The Presumption Of Sanity

A criminal defendant is presumed sane.[42] A criminal defendant asserting the insanity defense bears the burden of proving legal insanity by a preponderance of the evidence.[43] Before October 1, 1994, once a defendant asserted the defense of insanity, the prosecutor was obliged to prove sanity beyond a reasonable doubt.[44] "In other words, if the defendant asserted an insanity defense, the prosecutor bore the additional burden of *disproving* insanity."[45] The 1994 amendment to the insanity statute was intended to reform the scheme so that defendants who were not truly insane could less readily avail themselves of the benefits of that defense.[46]

Properly reflecting the provisions of MCL 768.21a(1) and (3), the trial court instructed the jury that the insanity defense requires a finding, on a preponderance of the evidence, that the defendant lacked "substantial capacity either to appreciate the nature and quality of the wrongfulness of his conduct or conform his conduct to the requirements of the law."

Hanna presented testimony from three experts, who respectively declared that he suffered from "psychosis affective disorder," was "definitely psychotic" and "very delusional," and was "legally insane." In rebuttal, the prosecutor offered the testimony from Gillespie's sons stating or implying that their acquaintances with Hanna brought to light no reasons to doubt his sanity. Further, we note that the evidence presented in the prosecutor's case-in-chief may also be considered as rebuttal.[47] Here, the prosecutor elicited testimony in the case-in-chief that Hanna appeared calm and deliberate just before the shooting and remained so through the course of shooting Gillespie twice and leaving the scene. Additionally, we note that Hanna's taped interviews with the police revealed that he was able to speak calmly and coherently in the days just after the homicide.

Although this record would have supported a finding of legal insanity, "[i]t is province of the jury to determine questions of fact and assess the credibility of witnesses."[48] It is

[41] *Lemmon, supra* at 648, n 27, quoting *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979).

[42] See *People v Murphy*, 416 Mich 453, 463; 331 NW2d 152 (1982); *People v Jones*, 151 Mich App 1, 5; 390 NW2d 189 (1986).

[43] MCL 768.21a(3).

[44] *People v Stephan*, 241 Mich App 482, 488-489; 616 NW2d 188 (2000), quoting *In re Certified Question (Duffy v Foltz)*, 425 Mich 457, 465; 390 NW2d 620 (1986).

[45] *Id.* at 489 (emphasis in the original).

[46] *Id.* at 498-499.

[47] *Jones, supra* at 6.

[48] *Lemmon, supra* at 637.

apparent that Hanna, despite his peculiar story and his parade of experts, simply failed to persuade the jury that he was legally insane when he killed Gillespie, particularly in light of the evidence of his normal behavior aside from the shooting. This Court must defer to the jury's assessment of the evidence and its factual conclusions[49] and we do so here. There was no dispute that Hanna shot and killed Gillespie with premeditation and the evidence that he was mentally ill was abundant. We conclude that the verdict of guilty but mentally ill was well supported and we will not disturb the jury's decision to reject Hanna's insanity defense.

We further decline to rule that the rejection of the insanity defense was improper as a matter of law. To do so would be the same as saying that the jury was obliged to believe at least one witness who testified in support of a not guilty by reason of insanity verdict, where in fact the jury was not obliged to believe *any* witness, lay or expert. Because the defense bears the burden of overcoming the presumption of sanity[50] the prosecution need not rebut the evidence of insanity at all where the jury is not persuaded that the evidence of insanity preponderates against the presumption of sanity in the first instance. We do not favor speculation into the motives behind a jury's verdict.[51] Instead, the inquiry is whether the verdict to which the jurors agreed is supported by the evidence.[52] We conclude that it was.[53]

VII. Ineffective Assistance of Counsel

A. Standard Of Review

Hanna raised the issue of ineffective assistance of counsel within the motion for a new trial, in which appellate counsel complained that trial counsel had failed to make a proper record of the motion to change venue and that trial counsel failed to object to the prosecutor's closing arguments relating to sympathy, civic duty, and denigration of the defense, thus preserving those issues for appellate review. Hanna abandoned the change-of-venue issue on appeal, but raises several other issues that were not raised below. This Court must review any issues not presented below on the basis of mistakes apparent on the record.[54] "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's

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[49] *Id.*

[50] MCL 768.21a(3).

[51] See *People v Cazal*, 412 Mich 680, 688; 316 NW2d 705 (1982).

[52] *Id.*

[53] Hanna asserts on appeal that the trial court "found the defense carried its burden of proving legal insanity" and "acknowledge[d] that the defense carried the burden of proving legal insanity." We find nothing in the record that Hanna cites to us to substantiate this assertion

[54] *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994) citing *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance."[55]

B. Legal Standards And Hanna's Claims

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel.[56] The constitutional right to counsel is a right to the *effective* assistance of counsel.[57] Appellate counsel, at the motion for a new trial, stated that trial counsel "worked hard and diligently on this case," and the record below confirms that account. Nonetheless, on appeal, Hanna argues that counsel was ineffective because counsel failed to object to the prosecutor's remarks encouraging the jury not to allow Hanna to use the insanity defense as an "avenue of escape." Hanna again argues that it is improper to urge the jury to convict out of fear that a defendant will otherwise be set free and we again observe that no such argument is actually to be found within the statements in question. Instead, the prosecutor urged the jury not to allow a person who deliberately kills another to escape responsibility by claiming insanity. Implicit in the argument was the suggestion that Hanna could, but chose not to, conform to the requirements of the law and thus that the insanity defense was legally inapplicable. A prosecutor enjoys wide latitude in fashioning arguments and may argue the evidence and all reasonable inferences from it.[58] Had defense counsel objected, counsel could have expected little more than minor clarification along these lines. Further, again, to the extent that the prosecutor's statements included improper civic-duty argument, such impropriety was curable by the trial court's instruction that arguments of counsel were not evidence.[59] In this instance, we conclude that defense counsel committed no substantial error resulting in substantial prejudice to Hanna.

Hanna argues that his counsel failed to object to the testimony that he chose to stand on his right to remain silent. However, as discussed above, the jury could hardly have inferred Hanna's guilt from his decision to terminate his interview with the police when counsel arrived and so advised him. Because Hanna's identity as the killer was not at issue, and his cooperation with defense counsel in declining to speak further to the police bears but little on the defense theory of insanity, counsel had little reason to object. We conclude that Hanna suffered no prejudice in this respect.

Hanna states incidentally that his counsel failed to object to the prosecution's denigration of the defense during the trial, but offers no examples or record citations to support that factual premise. "A party may not merely state a position and then leave it to this Court to discover and

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[55] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999) citing *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997).

[56] US Const, Am VI; Const 1963, art 1, § 20.

[57] *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996) citing *Strickland v Washington*, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[58] *Bahoda, supra* at 282 (citations omitted).

[59] *Stimage, supra* at 30.

rationalize the basis for the claim."[60] We will not consider this claim of error further. Hanna complains generally that in a post-judgment motion his trial counsel did not cite all instances of prosecutorial misconduct, but again leaves this Court to guess what these other instances may be. We decline to do so for the same reason.[61]

We conclude that Hanna has failed to show that defense counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that she was not functioning as an attorney guaranteed by the Sixth Amendment[62] or that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.[63]

VIII. Constitutionality of the Guilty-But-Mentally-Ill Verdict

A. Standard Of Review

Hanna argues that the statutory provision for the verdict of guilty but mentally ill violates constitutional principles of due process, on the ground that the verdict encourages conviction by giving the appearance of offering the jury a choice of a verdict whose severity lies between those of guilty and innocent by reason of insanity. Hanna concedes that this issue is not preserved. However, "appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome."[64] Constitutional interpretation is a question of law, calling for review de novo.[65] However, this Court should grant relief over an unpreserved issue "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[66]

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[60] *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (citations omitted).

[61] *Id*.

[62] *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

[63] *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

[64] *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

[65] See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999), and *People v McIntire*, 232 Mich App 71, 93; 591 NW2d 231 (1998).

[66] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (appendix) (1999), citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), and *Grant*, *supra*.

B. *People v Ramsey*

The Michigan Supreme Court has squarely rejected Hanna's argument in *People v Ramsey*.[67] We are obliged to follow the decisions of our state's highest court.[68] Any further development of the law in this area must come from the Supreme Court or the Legislature itself. There is nothing in our judicial charter that qualifies us to substitute our judgment for that of the Supreme Court or the Legislature on this matter and we decline to do so.

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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[67] *Ramsey*, *supra* at 514 (Brickley, J., joined by Williams, C.J., and Ryan, J., and in pertinent part by Boyle, J. *Ramsey* concerned US Const, Am XIV, § 1 exclusively, 422 Mich at 509, but Hanna does not argue that any different result is warranted under our state constitution's due process provision, Const 1963, art 1, § 17. The state and federal due process requirements are normally coextensive. See *People v Justice*, 216 Mich App 633, 636, n 2; 550 NW2d 562 (1996).

[68] *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000) citing *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993).