STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED July 3, 2008
v	No. 261498 Wayne Circuit Court
CHRISTOPHER JOHN BERNAICHE, Defendant-Appellee/Cross-Appellant.	LC No. 03-001733 ON REMAND

Before: Jansen, P.J., and Markey and Fort Hood,[1] JJ.

PER CURIAM.

This matter is again before us on remand from our Supreme Court. *People v Bernaiche*, 480 Mich 1046 (2008). Defendant appeals by right his jury-trial convictions of two counts of first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction and life for the assault-with-intent-to-commit-murder conviction. He was sentenced to a consecutive two-year term for the felony-firearm conviction. We affirm.

I. Underlying Facts and Proceedings

Defendant shot and killed two persons, and wounded three other persons, at a bar. This incident occurred approximately 45 minutes after defendant had been forcibly ejected from the bar for arguing with other patrons.

Defendant asserted the defense of legal insanity resulting from involuntary intoxication caused by his ingestion of the antidepressant drug Prozac. His dosage of Prozac had been doubled several days before the incident. Defendant's principal witness was Dr. Peter Breggin, a psychiatrist with a subspecialty in clinical psychopharmacology. Dr. Breggin testified that Prozac both stimulated and depressed defendant and made him susceptible to violent rages,

[1] Judge FORT HOOD has been assigned to decide this matter on remand in place of Judge COOPER, who has retired.

which, when combined with the earlier altercation at the bar, left him unable to conform his behavior to the requirements of the law. Defendant presented other witnesses who testified that his behavior at the bar was totally uncharacteristic for him, and that his behavior deteriorated after he began taking Prozac.

The prosecution presented the expert testimony of Dr. Philip Margolis, a psychiatrist, and Dr. Stephen Norris, a psychologist from the Center for Forensic Psychiatry, to rebut defendant's defense of legal insanity. Neither witness denied that consuming Prozac could cause a person to become violent; however, both witnesses opined that defendant was not legally insane at the time of the shootings because he could appreciate the wrongfulness of his conduct and could conform his behavior to the requirements of the law.

After his conviction, defendant moved for a new trial. He argued, inter alia, (1) that the prosecution's failure to disclose a supplemental report prepared by Dr. Margolis violated MCR 6.201 and warranted a new trial because the report undermined the prosecution's strategy of discrediting Dr. Breggin's testimony, and (2) that the issuance of a Public Health Advisory by the Food and Drug Administration (FDA), stating that persons who ingest drugs such as Prozac may be at greater risk of suicidal behavior, warranted a new trial because it constituted new evidence. The trial court granted the motion on the ground that the prosecution's failure to disclose the supplemental report prejudiced defendant.

II. Appellate Proceedings

This Court affirmed the grant of a new trial on the ground that the prosecution's failure to disclose Dr. Margolis's supplemental report prejudiced defendant. *People v Bernaiche*, unpublished per curiam opinion of the Court of Appeals, issued April 25, 2006 (Docket Nos. 255081; 261498). The *Bernaiche* panel did not directly address the issues raised by defendant on cross-appeal in Docket No. 261498, but addressed several issues raised by defendant on direct appeal in Docket No. 255081 for the reason that those issues might arise on retrial. The *Bernaiche* panel held that sufficient evidence supported defendant's convictions of first-degree murder, *id*. at 5-6, that the trial court did not abuse its discretion by admitting expert testimony from Drs. Margolis and Norris, *id*. at 6-8, and that the trial court did not err by rejecting defendant's proposed jury instructions on involuntary intoxication causing insanity, *id*. at 8.

Our Supreme Court, in lieu of granting plaintiff's application for leave to appeal in Docket No. 261498 or defendant's application for leave to appeal as cross-appellant, reversed that portion of this Court's judgment that affirmed the trial court's order granting defendant's motion for a new trial. Our Supreme Court observed that the prosecution had violated its discovery obligation by failing to disclose Dr. Margolis's supplemental report, but ruled that the violation constituted harmless error. Our Supreme Court remanded the matter to this Court for consideration of the issues raised by defendant that had not been addressed.

III. Analysis on Remand

A. Newly Discovered Evidence

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered, (2) the newly

discovered evidence was not cumulative, (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

Shortly after defendant's trial concluded, the FDA issued a Public Health Advisory indicating that patients taking Prozac and similar antidepressant drugs should be monitored "for possible worsening of depression or suicidality, especially at the beginning of therapy or when the dose either increases or decreases." The Advisory indicated that symptoms including irritability, impulsivity, and severe restlessness had been reported in patients being treated with antidepressants, and that a concern existed that patients exhibiting one or more of these symptoms could be at greater risk for worsening depression or suicide.

Defendant argues that the FDA Advisory was newly discovered evidence because it was not issued until after his trial concluded, that it was material because it corroborated Dr. Breggin's testimony, that it was not cumulative because no evidence from the FDA was produced at trial, that he could not have discovered and produced the evidence at trial because it did not exist at the time, and that it made a different result probable on retrial because it provided an explanation for his behavior during the time and would have made a manslaughter verdict more probable. We disagree.

The FDA Advisory at issue warned health care providers to monitor patients for increased depression or suicidal thoughts when the patient's dosage of an antidepressant medication such as Prozac was changed. While defendant contended that he had suicidal thoughts after he began taking a larger dose of Prozac, he based his defense at trial on the assertion that his ingestion of Prozac affected him to such an extent that he committed *homicide*. The FDA Advisory did not discuss any relation between the taking of antidepressant medication and homicidal thoughts, and came to no conclusion regarding any such connection. In this respect, the Advisory would not have served to corroborate Dr. Breggin's testimony. Defendant has not shown that this evidence would have made a different result probable on retrial. *Id*. at 692. The trial court did not abuse its discretion by denying defendant's motion for a new trial on this ground. *Id*. at 691.

B. Prosecutorial Misconduct

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues that the prosecution engaged in misconduct and denied him a fair trial (1) by denigrating the affirmative defense of legal insanity resulting from involuntary intoxication caused by ingestion of Prozac and (2) by ridiculing the defense expert, Dr. Breggin. We disagree.

Defendant failed to object at trial to the remarks about which he now complains; thus, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The prosecution cannot disparage a valid defense and urge the jury to reject the defense simply because the prosecution does not approve of the defense. Such disparagement constitutes reversible error. See *People v Wallace*, 160 Mich App 1, 7-9; 408 NW2d 87 (1987).[2] However, in this case the prosecution did not engage in such disparagement. The prosecution did not suggest that legal insanity resulting from involuntary intoxication should not be a sanctioned defense, or that its use was bad public policy. We acknowledge that the prosecution referred to defendant's defense as "junk science" and "spurious," but those characterizations were made outside the presence of the jury and therefore could not have denied defendant a fair trial. We also recognize that the prosecution used the word "silliness" during its opening statement and characterized the defense as one in which defendant would argue that "the Prozac made [him] do it." However, the prosecution used the word "silliness" when urging the jury to pay attention not to "silliness" but to "the details of the case." This statement, considered in context, was not a disparagement of the defense of legal insanity, but a request that the jury consider the actual evidence presented. Moreover, the prosecution's statements characterizing the defense as "the Prozac made [him] do it" were accurate because that was in fact the substance of defendant's defense. These comments were made in support of the prosecution's position that the evidence did not support defendant's theory that he had acted under the influence of Prozac. See *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996) (observing that "prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms"). The prosecution's comments did not constitute the type of disparagement of which this Court disapproved in *Wallace*. Moreover, any prejudice resulting from these comments could have been cured by a cautionary instruction. See *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

A prosecutor's unfounded personal attacks on and ridicule of a defendant's expert witness can warrant reversal of a conviction. See *People v Tyson*, 423 Mich 357, 375-376; 377 NW2d 738 (1985). However, the bias of a witness is relevant to the witness's credibility. *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). Dr. Breggin testified on direct examination that he had devoted significant study to the dangers of drugs such as Prozac, that he had written books and articles regarding these dangers for both professional and lay audiences, that he believed that drug manufacturers had attempted to conceal information regarding the dangers of psychiatric drugs including Prozac, and that he had testified in numerous cases regarding the dangers of such drugs. In this context, the prosecution's questions as to whether Dr. Breggin was a "crusader" against Prozac and similar drugs were designed to examine Dr. Breggin's bias, and to thus undercut his testimony that Prozac compelled defendant's actions. Similarly, the prosecution's statement that Dr. Breggin had been disqualified from testifying about Prozac in other cases, while factually erroneous,[3] was relevant to Dr. Breggin's attitude toward psychiatric medications in general. Lastly, the prosecution's question concerning whether other academics and professionals disagreed with Dr. Breggin's theories was designed to explore whether those theories were widely accepted or were seen as controversial. These

[2] In *Wallace*, the prosecutor asserted that the defense of insanity allowed some perpetrators to escape imprisonment, and suggested that such a development constituted bad public policy.

[3] Dr. Breggin had been disqualified from testifying about other psychiatric drugs in the past, but not Prozac.

statements and comments were not designed to belittle or ridicule Dr. Breggin himself, but rather were designed to diminish his credibility by demonstrating that he was a biased witness. Evidence of bias is "almost always relevant," and impeachment on the basis of a witness's perceived biases is certainly permissible. *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001).

The prosecution's comments and questions, considered in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), were not inappropriate. Further, any prejudice created by these remarks or questions could have been cured by a timely instruction. *Leshaj*, *supra* at 419. We conclude that no plain error occurred. *Carines*, *supra* at 763-764. The trial court did not abuse its discretion by declining to grant defendant a new trial on this ground.

C. Admission of Expert Testimony

The qualification of a witness as an expert and the admissibility of the expert's testimony are issues within the trial court's discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

Defendant argues that while his expert witness, Dr. Breggin, was qualified to testify regarding the defense of legal insanity resulting from involuntary intoxication caused by the use of Prozac, the prosecution's expert witnesses, Drs. Margolis and Norris, were not qualified to refute this theory because they did not have expertise in psychopharmacology. Defendant asserts that the trial court's decision to admit the testimony of Drs. Margolis and Norris relieved the prosecution of the requirement that it present expert testimony to rebut his asserted defense.

The law of the case doctrine provides that an appellate ruling on a particular issue binds the appellate court and all lower courts during subsequent proceedings in the case. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

Defendant raised this issue in his claim of appeal in Docket No. 255081. In our original decision, we held that the trial court did not abuse its discretion by admitting the testimony of Drs. Margolis and Norris, *Bernaiche*, *supra* at 7-8, noting that the "flaw in defendant's argument is that the testimony of Drs. Margolis and Norris was not intended to directly address Dr. Breggin's Prozac theory, but to address defendant's state of mind or mental capacity." *Id.* at 7. Our Supreme Court left undisturbed this Court's holding on this issue. Thus, this Court's ruling on this issue stands as the law of the case. *Herrera*, *supra* at 340.

D. References to Police Reports and Forensic Evaluation

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). An evidentiary error does not merit reversal unless, after an examination of the entire record, it appears more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant argues that the prosecution improperly relied on inadmissible hearsay contained in police reports to falsely imply that he had been arrested for or convicted of domestic violence. He also argues that the prosecution improperly relied on statements he made to

personnel at the Forensic Center to imply that he was intoxicated, rather than under the influence of Prozac, at the time of the shootings. Defendant asserts that the trial court abused its discretion by denying the motion for a new trial on these grounds. We disagree.

Defendant did not object to the questions regarding the police reports; thus, our review is for plain error. *Carines*, *supra* at 763-764. The police reports referred to by the prosecution during the cross-examination of Dr. Breggin and during the examinations of Drs. Margolis and Norris detailed confrontations between defendant and his girlfriend and between defendant and others in the months prior to the shootings and before defendant began taking Prozac. The prosecution's intent in using these reports was to demonstrate to the jury that defendant was capable of reacting with anger prior to the time he began taking Prozac. The evidence was relevant to a central issue in the case, MRE 401, and the prosecutor was entitled to prove specific instances in which defendant reacted with anger prior to taking Prozac, see MRE 405(b). The reports were not introduced into evidence, and the prosecution never maintained that defendant was arrested during any of the incidents. No plain error occurred.

MCL 768.20a(5) provides that statements made by a defendant to personnel at the Forensic Center or to an independent examiner are not admissible and do not have probative value on any issue other than the defendant's mental state at the time of the alleged offense. Defendant asserted the defense of legal insanity caused by involuntary intoxication resulting from ingestion of Prozac. The prosecution contended that if defendant was intoxicated when the shootings occurred, it was due to his voluntary consumption of alcohol. The Forensic Center report indicated that defendant stated that he had drunk heavily in the past, including in the months prior to the shootings. The report also indicated that defendant reported that he had consumed several alcoholic drinks on the night of the shootings. The evidence that defendant consumed alcohol on the night of the shootings was directly relevant to the issue of defendant's sanity at the time of the shootings. MCL 768.20a(5).

The admission of evidence that defendant used alcohol in the past was not outcome-determinative. The prosecution argued that Dr. Breggin's conclusion that defendant was involuntarily intoxicated due to ingestion of Prozac was not credible. The prosecution did not argue that the jury should reject the defense of involuntary intoxication based on the evidence that defendant had drunk heavily in the past, and did not argue that this evidence constituted substantive evidence of defendant's guilt. Cf. *People v Quinn*, 194 Mich App 250, 253-254; 486 NW2d 139 (1992). The admission of evidence that defendant used alcohol in the past does not merit reversal of his convictions.

E. Reference to Defendant's Right to Refrain from Testifying

Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review for plain error, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant argues that the prosecution engaged in misconduct and denied him a fair trial when it commented on his right refrain from testifying in his own defense. During the questioning of defendant's mother, the prosecution commented that defendant, himself, would be

in a better position to say whether he had taken Prozac on the day of the shootings. Defendant argues that this prosecutorial statement was a direct comment on his right to remain silent and to refrain from testifying, and was intended to cause a mistrial.[4] Defendant asserts that his decision not to move for a mistrial, but instead to request a curative instruction, allows review of this issue under the plain error standard. We disagree.

Defendant objected immediately after the prosecution made the inappropriate comment. The trial court excused the jury and adjourned proceedings until the following day. The next day, the defense announced its decision to request a curative instruction rather than to move for a mistrial. The defense clearly realized that it had the option of moving for a mistrial, but affirmatively chose to forego that option. The defense waived the right to seek a mistrial, and cannot now claim that the trial court's failure to grant a new trial on this ground was an abuse of discretion. *Id*.; see also *People v Pollick*, 448 Mich 376, 387-388; 531 NW2d 159 (1995).[5]

F. Jury Instructions

We generally review de novo a claim of instructional error. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). But we review for an abuse of discretion the trial court's decision concerning a requested supplemental jury instructions. See *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

Defendant argues that the trial court erred by refusing to give defendant's proposed, supplemental jury instructions concerning involuntary intoxication. Defendant asserts that the instructions given by the trial court did not adequately explain to the jury that defendant's involuntary intoxication resulted from unexpected side effects of a prescription medicine.

Defendant raised this issue in his claim of appeal in Docket No. 255081. This Court held that the trial court's instructions, which were modeled on CJI2d 7.10 (involuntary intoxication) and CJI2d 7.11 (insanity), were adequate, fully complied with *People v Caulley*, 197 Mich App 177; 494 NW2d 853 (1992),[6] and were proper. *Bernaiche*, *supra* at 8. Our Supreme Court left

[4] Defendant asserts on appeal that the prosecution actually wanted to cause a mistrial for the purposes of inconveniencing defendant and driving up his litigation costs.

[5] Even assuming arguendo that defendant merely forfeited this issue, we conclude that no plain error occurred. A comment regarding a defendant's right to remain silent or to refrain from testifying is error; however, whether such an error necessitates a mistrial is left to the trial court's discretion. *People v Jansson*, 116 Mich App 674, 690; 323 NW2d 508 (1982). The trial court gave the defense ample time to consider its options, and acting on defendant's wishes, instructed the jury that defendant's decision to not testify should not affect its verdict. A jury is presumed to follow its instructions. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Defendant has not shown that he would have been entitled to a mistrial on the ground that the improper comment was so prejudicial that it impaired his right to a fair trial. See *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

[6] In *Caulley*, this Court held that involuntary intoxication "can constitute a complete defense if the defendant was unexpectedly intoxicated because of the ingestion of a medically prescribed drug." *Caulley*, *supra* at 188.

undisturbed our holding on this issue. Therefore, this Court's ruling on this issue stands as the law of the case. *Herrera*, *supra* at 340.

G. Prosecution's Failure to Supplement Discovery

Finally, defendant asserts that the prosecution engaged in misconduct in various ways, including by failing to supplement discovery and to disclose the supplemental report prepared by Dr. Margolis.

As noted previously, the trial court granted defendant a new trial on the ground that the prosecution had failed to turn over the supplemental report prepared by Dr. Margolis. This Court affirmed the trial court's ruling on this issue, but our Supreme Court reversed this Court's decision. Our Supreme Court's decision on this issue is binding as law of the case. *Id*.

IV. Conclusion

In sum, we conclude that the issues raised by defendant in Docket No. 261498 are either without merit or have already been decided adversely to defendant by this Court or by our Supreme Court. We perceive no error requiring reversal.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Karen M. Fort Hood