

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
November 14, 2013

v

CAROLINE L. HOCKING-SULLIVAN,
Defendant-Appellee.

No. 315827
Macomb Circuit Court
LC No. 2012-001590-FC

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

A jury convicted defendant of one count of assault with intent to commit murder, MCL 750.83, and three counts of assault with a dangerous weapon, MCL 750.82(1). The trial court sentenced defendant to concurrent terms of 4 to 20 years' imprisonment for the assault with intent to commit murder conviction, and two to four years' imprisonment for each of the assault with a dangerous weapon convictions. The prosecutor appeals by leave granted the trial court's grant of defendant's motion for bond pending appeal and the trial court's denial of the prosecution's motion for reconsideration.¹ We affirm.

The prosecution argues that the trial court abused its discretion when it granted defendant's motion for bond pending appeal, and denied the prosecution's motion for reconsideration. We disagree.

We review a trial court's decision to grant a bond pending appeal for an abuse of discretion. MCR 7.209(B)(2). We also review a trial court's denial of a motion for reconsideration for an abuse of discretion. MCR 2.119(F)(3); *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013) (citations and quotation marks omitted).

¹ *People v Hocking-Sullivan*, unpublished order of the Court of Appeals, entered May 23, 2013 (Docket No. 315827).

For a trial court to grant bond pending appeal from an assaultive crime, it must find by clear and convincing evidence that defendant is not likely to pose a danger to others and that the appeal raises a substantial question of law or fact. MCL 770.9a(2).

There exists clear and convincing evidence that defendant is not a danger to other people. The prosecution argues that all of defendant's evidence supporting this contention was unsubstantiated and self-serving. This argument lacks merit. Defendant had been out on bond for two years and did not have any incidents during this time. The trial court noted that she also participated in rehabilitative programs for her substance abuse. This two-year record of good behavior, as noted by the trial court, is strong evidence that she did not pose any danger to others. Furthermore, there was testimony that defendant lives with her sister in a stable home environment. Therefore, there is clear and convincing evidence that defendant is not likely to pose a danger to other people.

There also exists clear and convincing evidence that defendant's appeal would raise a substantial question of law or fact. The plain language of MCL 770.9a(2) does not require a showing of success on appeal. Rather, it requires a showing by clear and convincing evidence that a substantial question of law or fact exists.

Here, there exists, by clear and convincing evidence, a substantial question of law or fact. There was an issue at trial whether defendant's hospital statements made to the detective while under the influence of drugs and semi-conscious, and while potentially still intoxicated, were a confession, and if they were a confession, whether it was voluntary. This is an important determination because a trial court does not have to determine voluntariness if defendant's statements "were admissions of fact, rather than a confession of guilt." *People v Wytcherly*, 172 Mich App 213, 219; 431 NW2d 463 (1988). "An admission of fact is distinguished from a confession of guilt in that an admission does not by itself show guilt in the absence of proof of other facts not admitted by the defendant." *Id.* (citations omitted). Given the trial court's inability to make a firm decision regarding defendant's hospital statements, it did not abuse its discretion in finding that there was a substantial question of law or fact.

Originally, over defendant's objection, the trial court permitted the prosecutor to use the statements for impeachment purposes only. However, after defendant's recorded statements were played to the jury, defendant once again challenged their admissibility. Defense counsel argued that if the statements were a confession, and they were involuntary, they would be inadmissible, even if a Miranda warning were given. The trial court then changed its mind, noting that there was a genuine issue whether the statements were voluntary and stated that a hearing should have been held to determine that. The trial court referred to defendant's statements as a confession, but then later off-handedly stated that it did not see them as a confession. The trial court agreed with defense counsel that based on the recordings, defendant was barely able to speak and noted that "she doesn't sound like she's really all there." The trial court also questioned the amount of barbiturates in defendant's body and whether that affected her ability to think and articulate clearly. After a lengthy discussion of how this issue should be resolved, the trial court stated that it would take the issue under advisement and consider it in a motion for a new trial. The trial court stated that the issue was "so detrimental to this defendant." Defense counsel stated that it did not want a mistrial, and that the error could be corrected by an instruction. Specifically, defense counsel stated that "we've gone too far. This

is one little fly in the ointment that we can correct by a simpl[e] instruction.” The trial court then instructed the jury to disregard defendant’s hospital statements because voluntariness was never determined by the court.

Because the trial court stated that it would take the matter under advisement in a motion for a new trial, defense counsel filed one. Defendant also filed a motion for a mistrial after the trial, but the trial court determined that defendant had waived a mistrial. Defense counsel argued that the statements were a confession because they proved that defendant had two knives that evening, and one had a black handle. Defendant noted that her contention throughout trial was that the black-handled knife did not exist. Defendant contended that her hospital statements clearly place the knife in her hand, because she admitted to the detective that she had two knives and that one was black-handled. Defendant noted that this black-handled knife was found in the kitchen sink, in a different room from where defendant was located, and it did not contain defendant’s fingerprints. Further, defendant argued that no one could account for the knife’s mysterious location.

At the motion hearing, the trial court stated that defense counsel should have demanded a mistrial and defense counsel agreed that he probably should have. Defense counsel argued that the involuntary statements may not be used for any purpose, and the trial court stated that defense counsel should have challenged this at a pretrial hearing, to which defense counsel stated “Okay. Then I am ineffective.” However, despite the trial court’s earlier statement, the trial court determined that defense counsel was not ineffective because his decision to not request a mistrial was trial strategy. The trial court further determined that defendant’s remaining arguments regarding the hospital statements lacked merit and she was not entitled to a new trial. The trial court never addressed defendant’s argument whether the statements amounted to an admission of guilt.

The trial court then indicated it would take defendant’s motion for bond pending appeal under advisement. Defense counsel expressed a desire to address the motion at that time and the trial court stated, “I would really suggest that you wait until after the sentence because I think you will be interestingly surprised by what will happen.” The trial court then proceeded to sentencing. Immediately after the sentencing, defense counsel moved for bond pending appeal. The trial court stated that its findings regarding ineffective assistance of counsel were quite clear. With regard to defendant’s hospital statements, the trial court stated that it was still perplexed whether the curative instruction was “sufficient to take away any possible taint that the jury may have sustained” by listening to the tape without a hearing to determine voluntariness. As such, the trial court determined that there was clear and convincing evidence to grant defendant’s motion for bond.

Plaintiff correctly notes that in the trial court’s opinion and order denying defendant’s motion for a mistrial, it stated that defendant’s statements were not incriminating and did not concern admissions of fact. However, there appears to be an underlying presumption in the trial court’s ruling on the motion for bond pending appeal, which was issued after the order denying the mistrial, that the court felt that the statements were involuntary confessions, and thus, inadmissible. If the trial court felt that the statements were admissions of fact, then the statements would have been properly admitted, and the trial court would not have viewed this issue as being “so detrimental to this defendant” and would not feel “perplexed” as to whether

the curative instruction was “sufficient to take away any possible taint that the jury may have sustained.” Although curative instructions are generally sufficient to cure most errors, *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008), and jurors are presumed to follow instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), our Supreme Court has stated that the admission of an involuntary confession warrants a new trial. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). Throughout the trial and the post trial motions, the trial court was never able to make a firm decision regarding defendant’s hospital statements. Thus, there exists a substantial question of law or fact whether defendant’s statements were admissions of fact or confessions, and if they were confessions, whether they were voluntary.

Additionally, there was a substantial question of law or fact as to whether defendant truly received effective assistance of counsel. Both the trial court and defense counsel stated that a mistrial should have been demanded at the time the statements were heard by the jury. Yet, for reasons unknown, the trial court changed its mind and determined that it was a matter of trial strategy. At the time the statements were heard, there was a lengthy discussion on the record, where both the trial court and defense counsel expressed their concern over the detrimental effect of the statements. The trial court’s concern alone should have prompted defense counsel to move for an immediate mistrial. The fact that defense counsel expressly waived a mistrial and only requested a curative instruction creates a substantial question as to whether he was effective, particularly whether but for counsel’s actions there is a reasonable probability the outcome would have been different and whether defense counsel’s actions resulted in fundamentally unfair proceedings. See *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra