STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ELWOOD HICKS,

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

No. 175319
LC No. 92-116658-FC

Before: Taylor, P.J., and Fitzgerald and P.D. Houk,* JJ.

PER CURIAM.

Defendant was charged with five counts of assault with intent to murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, unlawfully driving away an automobile, MCL 750.413; MSA 28.645, and seven counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). A supplemental information charged defendant with habitual offender, second offense, MCL 769.10; MSA 28.1082. Following a jury trial, defendant was convicted of three counts of assault with intent to murder, MCL 750.83; MSA 28.278, two counts of felonious assault, MCL 750.82; MSA 28.277, one count of UDAA, MCL 750.413; MSA 28.645, and six counts of felony-firearm, MCL 750.227b; MSA 28.424(2). The charge of armed robbery and the attendant felony-firearm were dismissed by the court before the jury's deliberations. Defendant subsequently pleaded guilty of being a second felony offender, and was sentenced to three concurrent prison terms of twenty-five to fifty years for assault with intent to murder, two concurrent terms of two to four years for felonious assault, four months to five years for UDAA, to be served consecutive to six concurrent two year terms for felony-firearm. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the October 14, 1991, shootings of Rose Varnado (defendant's girlfriend), Marvin Bednarsh (defendant's employer), and three strangers, Robert Banker, his wife Theresa Banker, and their son Robert Banker, Jr., and the theft of the Bankers' automobile after the shooting spree.

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

I

Defendant first claims that the evidence was insufficient to support his convictions for assault with intent to murder. Specifically, defendant asserts that, because the evidence of diminished capacity was so overwhelming, the prosecution failed to prove that he possessed the specific intent to commit the crimes. We disagree.

After describing defendant's condition before and at the time of the shooting as told to her by defendant, plaintiff's rebuttal expert witness, Dr. Holden, diagnosed defendant as having suffered from cocaine delusional disorder. This diagnosis was consistent with the diagnosis reached by defendant's expert witness, Dr. Shiener. However, Dr. Holden opined that defendant did not suffer from a diminished capacity at the time he committed the offenses. This opinion was based on the fact that defendant was able to engage in "all sorts of intentional behavior," that he admitted that he intended to shoot his girlfriend and his employer, and that he was able to describe his "organized" behavior. Dr. Holden disagreed with Dr. Shiener's opinion that defendant was unable to form the intent necessary to commit the crimes charged. Thus, the question of whether defendant could and did form the specific intent necessary for the crimes charged became a question of the credibility of the two competing expert witnesses. If the jury chose to believe Dr. Holden's testimony that defendant had the ability to form the specific intent despite the existence of the cocaine delusional disorder, this evidence was sufficient to establish specific intent under the standard set forth in *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979).

II

Defendant next cites several instances of conduct by the prosecutor that he contends were improper and denied him a fair trial. First, defendant asserts that the prosecutor denigrated defense counsel during his rebuttal closing argument. Because defendant did not object to the allegedly improper remarks, appellate review is foreclosed unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction and this Court's failure to consider the issue would result in a miscarriage of justice. *People v Duncan* 402 Mich 1, 15-16; 260 NW2d 58 (1977); *People v Price*, 214 Mich App 538, 546-547; 543 NW2d 49 (1995). Whether a prosecutor's remarks are error can only be determined on a case-by-case basis after examining the context in which they were made. *People v Burnett*, 166 Mich App 741, 754; 421 NW2d 278 (1988). Reviewing the remarks in the context in which they were made, we conclude that any prejudice as a result of the remarks could have been cured by a timely instruction and that a miscarriage of justice will not result from our failure to consider this argument.

Second, defendant cites four passages in which he contends that the prosecutor denigrated his expert witness. The first occurred during the prosecutor's voir dire of defendant's proposed expert witness, Dr. Shiener. Defendant did not object to the alleged "attack" on the witness, and we are

unable to discern where the alleged misconduct arose. Our failure to review this unpreserved issue will not result in a miscarriage of justice.

The second occurred during the prosecutor's cross-examination of Dr. Shiener during which the prosecutor was permitted, over defendant's objection on relevancy grounds, to inquire about the doctor's prior experiences as a defense expert witness. On appeal, defendant contends that the prosecutor's impeachment technique was impermissible misconduct that severely prejudiced him. An allegation of error is not properly preserved for appellate review where the ground asserted on appeal is different than that asserted at trial. *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992).

The third occurred during the prosecutor's closing and rebuttal arguments. Defendant did not object to the prosecutor's implicit suggestion in closing argument that defendant's expert witness was "paid to say what he said," nor to the explicit remark in rebuttal. Rather, defense counsel attempted to attack head-on the implication in his closing argument. While we think that the prosecutor's argument was improper and bordered on misconduct, we hold that, absent an objection at trial, it does not mandate reversal of defendant's conviction. *People v Tyson*, 423 Mich 357, 373-376; 377 NW2d 738 (1985); *People v Chatfield*, 170 Mich App 831, 834; 428 NW2d 788 (1988). Any prejudice that resulted could have been cured by a *timely* objection and request for a curative instruction. *Duncan*, *supra*.

Next, defendant contends that the prosecutor improperly appealed to the sympathy of the jury, vouched for the credibility of her case, placed the prestige of her office behind the charges against defendant, and urged the jury to convict based on their civic duty. We have reviewed the allegedly improper comments, to which no objections were made, and find that failure to review this claim would not result in a miscarriage of justice.

III

Defendant next maintains that the prosecutor improperly cross-examined defendant's expert witness on the legal issue of insanity and voluntary intoxication. He contends that this line of questioning was irrelevant, highly prejudicial, and misleading because insanity was not at issue in this case. Defendant did not object to the admission of the evidence, and, therefore, appellate review is precluded absent manifest injustice. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Here, defense counsel opened the door on the topic of insanity by having inquired of his expert whether defendant was "insane." Manifest injustice is not present in this case.

Defendant also claims that, over his objection, the prosecutor improperly questioned defendant's expert on his testimony in other related cases to bolster the prosecutor's opinion that the expert was a "hired gun." We disagree. Defense counsel opened the door by inquiring into the doctor's experience and whether he had ever testified in court before. The trial court did not abuse its

discretion in permitting the questioning. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant further claims that the prosecutor impermissibly "testified" when she stated that defendant's expert "always" testifies for the defense in a certain manner. However, it is apparent that the prosecutor made this statement in response to defendant's second objection to her cross-examination. The prosecutor was not "testifying," but was explaining the reason for the line of questioning. There was not misconduct by the prosecutor sufficient to have deprived defendant of a fair trial. *Price, supra*.

IV

Defendant asserts that his waiver of his *Miranda* rights and his confession were not understandingly made because of his mental problems. We disagree. The evidence presented by the prosecution at the *Walker* hearing supports the trial court's findings that defendant's confession was voluntary and understanding. We are not convinced that a mistake has been made. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992); *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987).

V

Defendant next argues that the trial court abused its discretion in admitting the bloodied clothing of the victims because the evidence was not relevant to the disputed issue of intent and was unfairly prejudicial. However, a review of the record reveals that the trial court permitted only the introduction of the clothing belonging to Robert Banker that was not bloody and showed only bullet holes. The trial court precluded the introduction of the "real bloody clothing." Hence, defendant's suggestion that the bloody clothing of his girlfriend was introduced into evidence is misplaced. The admission of Banker's clothing, to which defendant did not object when admission was requested by the prosecutor, was relevant to the disputed issue of how many shots were fired. Accordingly, the trial court did not abuse its discretion in admitting Banker's clothing into evidence. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

Defendant also challenges the trial court's decision to admit evidence that Rose Varnado was unable to return to work because of her injuries. Based on the record, however, it is clear that this evidence had no effect on the verdict and, therefore, any error was harmless beyond a reasonable doubt. *People v Thinel (On Remand)*, 164 Mich App 717, 721; 417 NW2d 585 (1987).

VI

Defendant argues that error requiring reversal occurred when the trial court failed to give a preliminary instruction on the use of expert testimony as it related to the defense of diminished capacity. Defendant relies upon MCL 768.29a(1); MSA 28.1052(1)(1), which provides:

> If the defendant asserts a defense of insanity in a criminal action which is tried before a jury, the judge shall, before testimony is presented on that issue, instruct the jury on the law as contained in sections 400a and 500(g) of Act No. 258 of the Public Acts of 1974 and in section 21a of chapter 8 of this act.

Defendant did not assert a defense of insanity, but rather one of diminished capacity. This Court has ruled that the defense of diminished capacity comes within the codified definition of legal insanity, and that if a defendant avails himself of such a defense, full compliance with § 29a must be had. *People v Mangiapane*, 85 Mich App 379; 271 NW2d 240 (1978). See also *People v Hollis*, 140 Mich App 589, 591-592; 366 NW2d 29 (1985). The trial court did not instruct the jury in accordance with MCL 768.29a(1); MSA 28.1052(1)(1). The failure of the court to give preliminary instructions in accordance with this statute was error regardless of defendant's failure to request it. *People v Grant*, 445 Mich 535, 542-543; 520 NW2d 123 (1994). However, the error is not of the kind to warrant automatic reversal. *Id*. Because defendant has presented an unpreserved, nonconstitutional plain error argument, the question is whether the error affected defendant's substantial rights. *Id*. at 552.

Here, the jurors were asked during voir dire whether they agreed that a person may not always be responsible for their actions and whether they were familiar with the concepts of delusions, paranoia, hearing voices from televisions, and the relationship such conditions may have on a person's responsibility for their actions. The trial court informed the jury during final instructions that defendant's defense was that he could not have intended to commit the offenses because he did not have enough mental ability to form the requisite intents. Moreover, both experts explained the concept of diminished capacity in that such a state would have prevented defendant from forming the intent necessary to be held responsible for his crimes. Hence, we conclude that the error in failing to provide preliminary instructions on diminished capacity did not lead to significant confusion regarding the defense, and thus was not decisive of the outcome. Cf. *Grant, supra* at 553-554. Defendant has therefore failed to demonstrate the prejudice necessary to preserve this issue that was not raised before the trial court. *Id*.

Defendant also contends that because diminished capacity is a form of mental illness, the trial court was required to provide an alternate box on the verdict form for a verdict of not guilty by reason of diminished capacity. However, defendant did not request such a possible verdict, nor did he object to the verdict form as given to the jury. This issue has not been properly preserved. *Grant, supra*. In any event, defendant's argument is without merit. While the verdict of not guilty by reason of insanity is a recognized verdict alternative to not guilty or guilty but mentally ill, a verdict of not guilty by reason of diminished capacity, or by any other reason, is not a recognized verdict. Defendant has presented no supporting authority for his position that a verdict of not guilty by reason of diminished capacity is a recognized verdict.

Defendant next maintains that the trial court failed to instruct the jury that the expert testimony could only be used to determine defendant's mental state at the time of the offense, and that it could not be used to determine defendant's guilt. He contends, with little explanation, that this error infringed upon his Fifth Amendment privilege against self incrimination.

Defendant did not object to the jury instructions given, nor did he request such an instruction. This argument is therefore not properly preserved, and appellate review is waived absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). A miscarriage of justice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *Chatfield*, *supra* at 835. The omitted instruction did not pertain to a basic and controlling issue in the case, but rather it pertained to the permissible uses of defendant's statements to a psychiatric examiner. MCL 768.20a(5); MSA 28.10443(1)(5). Even if the instruction could be deemed to pertain to a basic and controlling issue, the failure to give the instruction was harmless. The evidence of defendant's intent and admission to committing the shootings was sufficiently proven by other evidence. Numerous witnesses, primarily the victims, testified as to defendant's actions before, during, and after the shootings. Thus, the failure to instruct consistent with the statute did not result in a miscarriage of justice. *Chatfield, supra*.

VII

Last, defendant argues that his sentence is disproportionate. We disagree. Defendant shot at five people, striking three and causing permanent physical injury to two and serious psychological injury to at least three. Defendant has had charges lodged against him twice in Indiana for possession of a gun without a permit. He was also under investigation in 1977 for a homicide in Indiana, and was tried, but acquitted, of first-degree murder in Alaska. Defendant has also admittedly been involved with the possession and use of large quantities of cocaine, and admits to marijuana and alcohol abuse for several years. In light of the circumstances surrounding this offense and this offender, the sentence imposed is not disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk