STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT LYNN WILEY,

Defendant-Appellant.

UNPUBLISHED
May 8, 1998

No. 198860
Shiawassee Circuit Court
LC No. 96-007538-FC

Before: Hood, P.J., and Markman and Talbot JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was subsequently sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and life imprisonment for the murder conviction. Defendant now appeals as of right. We affirm.

On appeal, defendant first argues that he was denied a fair trial when the trial court failed to instruct the jury on the defense of diminished capacity prior to the introduction of expert testimony on that issue. We disagree.

Pursuant to MCL 768.29a; MSA 1052a, a trial court must instruct the jury on the defense of insanity immediately before the commencement of testimony regarding insanity. *People v Grant*, 445 Mich 535, 541-542; 520 NW2d 123 (1994). This procedural requirement also applies to the defense of diminished capacity. *People v Denton*, 138 Mich App 568, 571; 360 NW2d 245 (1984). Because the diminished capacity defense is relevant to a defendant's ability to form the specific intent necessary to commit a particular crime, it is available as a defense to first-degree murder, but not as a defense to second-degree murder. See *People v Biggs*, 202 Mich App 450, 454 & n 1; 509 NW2d 803 (1993); *People v England*, 164 Mich App 370, 374-375; 416 NW2d 425 (1987). Here, because defendant was charged with first-degree murder, the trial court erred in failing to instruct the jury on the defense of diminished capacity immediately before the expert's testimony regarding diminished capacity. See *Grant*, *supra* at 542-543. However, because defendant failed to request the

instruction or object to its admission, the issue was not preserved for appeal. *Id.* at 553. As a general rule, an unpreserved plain error may not be considered on appeal unless the error could have been decisive of the outcome. *Id.*

Under the facts of this case, we are not persuaded that the error involved led to significant confusion regarding the diminished capacity defense or that it was decisive of the outcome. First, the court properly instructed the jury on the concept of diminished capacity at the conclusion of the trial. Cf. *People v Giuchici*, 118 Mich App 252, 264-265; 324 NW2d 593 (1982). Second, by convicting defendant of second-degree murder, the jury implicitly acquitted defendant on the charge of first-degree murder. Accordingly, the verdict was consistent with the jury having understood and accepted defendant's diminished capacity defense. Defendant's reliance on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), for the proposition that he was prejudiced by the error concerning the first-degree murder charge (despite being acquitted of that charge) is misplaced. The danger of a compromise verdict identified in *Vail*, *supra* at 464, was based on the jury's consideration of a charge unwarranted by the proofs. In this case, the trial court's error did not allow consideration of a charge that should not have been before the jury. For these reasons, we hold that defendant is not entitled to relief on this issue.

Next, defendant argues that he was denied a fair trial as a result of the trial court's "confusing and conflicting" instructions regarding the defense of diminished capacity and the elements of the charged offenses. We disagree. Defendant did not object to the challenged jury instructions at trial. Therefore, we will we review this issue only to determine if manifest injustice resulted. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice did not result in this case because the trial court's instructions to the jury regarding the defense of diminished capacity and the elements of each of the charged offenses were given in an understandable manner and accurately stated the law.

Defendant also argues that his life sentence for the second-degree murder conviction was disproportionately severe. We disagree. Defendant's life sentence falls within the range recommended by the sentencing guidelines and is, therefore, presumptively proportionate. See *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). At sentencing, defendant presented no evidence of "unusual circumstances" sufficient to render this sentence disproportionate. See *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Given the circumstances of the offense and the offender, we hold that the trial court did not abuse its discretion in sentencing defendant to life in prison. Finally, contrary to defendant's suggestion, the trial court's remark that it was not inclined to consent to parole and that it did not believe defendant should be released short of serving his life sentence did not convert defendant's sentence to one of life in prison without parole, or his conviction to one of first-degree murder.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot