

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GAIL ANN GUZIKOWSKI,

Defendant-Appellant.

UNPUBLISHED

September 17, 1999

No. 206947

Manistee Circuit Court

LC No. 97-002707

Before: Sawyer, P.J. and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of first-degree felony murder, MCL 750.316; MSA 28.548. The trial court sentenced defendant to life in prison without the possibility of parole. We reverse and remand.

Upon learning that her longtime boyfriend was having an affair with another woman, defendant removed her belongings from her boyfriend's house in the city of Manistee and drove to her son's house in Reed City. Among her belongings was a .357 magnum revolver she had been holding for her brother. When defendant arrived in Reed City, she dropped off her things and decided to return to Manistee. She testified that her plan was to kill herself in front of her boyfriend using her brother's gun. When defendant returned to her boyfriend's house, he was not there, so she drove to the other woman's house. Defendant testified that she could not remember driving to the house, but that she remembered ending up there. Defendant entered the house uninvited, discovered her boyfriend and the other woman in an intimate position, and shot her boyfriend multiple times.

Defendant was tried on charges of first-degree premeditated murder and first-degree felony murder based on the underlying felony of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). Defendant attempted to put forth a defense of diminished capacity. Her attempt was thwarted when the trial court struck the entire testimony of her expert psychiatric witness, Dr. Emanuel Tanay. Thereafter, the trial court refused to instruct the jury on the defense of diminished capacity. The jury found defendant not guilty of first-degree premeditated murder and guilty of first-degree felony murder based on the underlying felony of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2).

On appeal, defendant argues that the trial court erred in striking the expert testimony regarding her diminished capacity defense. We agree. Whether to admit expert testimony is a matter within the trial court's discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). The party proffering the expert bears the burden of persuading the trial court that the expert has specialized knowledge which will aid the fact finder in understanding the evidence and determining a fact in issue. *Id.* at 112.

A criminal defendant may offer evidence of "diminished capacity" in an attempt to show that, at the time of the offense, he or she lacked the mental capacity to form the requisite specific intent. See, e.g., *People v Denton*, 138 Mich App 568, 570-571; 360 NW2d 245 (1984). Accordingly, diminished capacity is only a partial defense and it is only available in cases where the prosecution is required to prove a specific intent. See *People v Schmitz*, 231 Mich App 521, 531-532 & n 3; 586 NW2d 766 (1998); see also *People v Pickens*, 446 Mich 298, 365; 521 NW2d 797 (1994) (Levin, J., concurring in part and dissenting in part). In order for a defendant to successfully present a diminished capacity defense, the jury must find that the defendant was "mentally ill." Cf. *Pickens*, *supra* at 331 (majority opinion). "Mental illness" is defined by law as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life." See MCL 330.1400a; MSA 14.800(400a); CJI2d 7.11(4).

Given the jury's not guilty verdict on the charge of first-degree premeditated murder, we need only be concerned with the defense of diminished capacity as it related to the specific intent element of the felony murder charge. To convict defendant of felony murder based on the underlying felony of first-degree home invasion, the jury was required to find that defendant entered the other woman's dwelling with the specific intent to commit an assault. Although Tanay was not permitted to complete his testimony on direct examination, he did opine that defendant was not capable of forming the specific intent to commit a "felonious assault" on the evening of the shooting and that her capacity to form a specific intent was diminished at the time she entered the house.

Part of the way through defendant's direct examination of Tanay, the trial court granted the prosecution's motion to strike Tanay's testimony. In so ruling, the trial court placed particular emphasis on a portion of Tanay's testimony characterized as standing for the proposition that defendant's state of mind the day of the shooting "did not rise to the level of a mental illness." In the absence of a mental illness, reasoned the trial court, no expert opinion was required.¹ The specific testimony relied on by the trial court was as follows:

Q. And I want to back into this a little bit now. Her intentions *when she drove from – to Reed City and from Reed City*, would it be your professional opinion that she was capable of forming an intent – a specific intent to kill"

A. Not as I understand the concept of specific intent in relation to first-degree murder, or in regard to murder generally.

Q. Why doctor?

A. Because her state of mind was such that she was acting under severe emotional stress, that *she was suffering from a psychiatric condition that I have called in my report adjustment disorder, which does not rise to the level of mental illness as defined in the law*, but it is a condition. And whether you agree or disagree that she suffered from it, there cannot be, in my opinion, doubt that she was in a state of emotional excitement. I mean, I think that's almost common sense. [Emphasis added.]

Given the context of Tanay's answer, it is unclear whether he was referring to defendant's state of mind when she committed the crime or to her state of mind as she was driving to and from Reed City. It was also unclear from Tanay's testimony whether defendant's so-called "adjustment disorder" provided the basis for his conclusion that defendant suffered from a diminished capacity when she entered the other woman's dwelling. For instance, Tanay later testified that when defendant drove to the other woman's house she entered a "disassociative state." He also explained that "disassociation" could cause a person's actions to be dictated by their unconscious mind as opposed to his or her conscious mind. With respect to defendant in particular, Tanay opined that her "disassociation" left her in a state of mind where she could not "reflect" or "choose." On this basis, we think a properly instructed jury would have been justified in finding that defendant suffered from a mental illness and was operating under a diminished capacity when she entered the house.² Therefore, we hold that it was error for the trial court to take this option away from the jury.

Defendant's diminished capacity defense was dependent on Tanay's expert psychiatric testimony. When the trial court struck Tanay's testimony, it effectively denied defendant the opportunity to present a diminished capacity defense. The right to present a valid defense is a fundamental element of due process. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). Accordingly, we conclude that defendant has established by a preponderance of the evidence that the trial court's error amounted to a miscarriage of justice necessitating reversal. See MCL 769.26; MSA 28.1096; *People v Lukity*, ___ Mich ___; ___ NW2d ___ (Docket No. 110737, issued July 13, 1999), slip op at 10.

As for the remedy, we note that the jury's verdict necessarily included a finding that defendant was guilty of the lesser included offense of second-degree murder, see *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990), and that diminished capacity is not a defense to the general intent crime of second-degree murder, *People v Biggs*, 202 Mich App 450, 454; 509 NW2d 803 (1993). Thus, the proper remedy for this error is to reverse defendant's first-degree felony murder conviction and remand for entry of a conviction of second degree murder and for resentencing. However, if the prosecution elects to re-try defendant on the charge of first-degree felony murder, it should be given that option. Cf. *People v Hutcherson*, 415 Mich 854; 327 NW2d 922 (1982); *People v Hoffmeister*, 394 Mich 155, 162; 229 NW2d 305 (1975).

Considering our resolution of defendant's first issue on appeal, we need not address defendant's argument that the trial court erred in permitting the prosecution to proceed on a felony-murder theory when no allegation of felony-murder was contained in the information or in the original bill of particulars.

Defendant next argues that the trial court erred in admitting into evidence certain photographs of the victim at the scene and from the autopsy. We disagree. The decision to admit or exclude evidence

is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant contends that the challenged photographs were inflammatory and unnecessary, considering that defendant did not dispute the fact that she shot the victim, the number of wounds, or the brutality of the killing. We do not find the photographs to have been extremely graphic or inflammatory. Although they depict a dead man's body, they do not show a large amount of blood and the wounds consisted only of small bullet holes. Moreover, it is well settled that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). Here, one of the facts the prosecution sought to prove was defendant's intent to kill her boyfriend. Toward that end, the location and number of bullet wounds on the victim's body was probative of the intent to kill because the placement of the wounds suggested a lack of accident. Cf. *id.* at 71. For these reasons, we hold that the trial court did not abuse its discretion in admitting the challenged photographs.

We reverse defendant's conviction of first-degree felony murder and remand for entry of a judgment of conviction on the lesser included offense of second-degree murder and for resentencing. If, however, the prosecutor is persuaded that the ends of justice would be better served, upon notification to the trial court before resentencing, the trial court shall vacate the judgment of conviction and grant a new trial on the charge of first-degree felony murder.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael J. Talbot

¹ We note that the trial court did not exclude Tanay's testimony on the ground that the underlying science was invalid. The validity of the science forming the basis of Tanay's testimony was not raised or addressed below and has not been raised on appeal.

² Because the trial court terminated Tanay's testimony part of the way through defendant's direct examination, we do not know what information would have been elicited upon further direct examination by the defendant or upon cross-examination by the prosecution. Perhaps some of the lingering questions regarding Tanay's testimony would have been answered if the trial court had allowed him to continue. Thus, even if the initial portion of Tanay's testimony did not support a finding of diminished capacity, the trial court's decision to act prematurely would have been erroneous.