

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE FISHER,

Defendant-Appellant.

UNPUBLISHED

September 11, 1998

No. 199560

Genesee Circuit Court

LC No. 95-053137 FC

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797. The trial court found defendant guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and sentenced defendant to twenty-two to forty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arises out the robbery of a supermarket, during which defendant displayed a gun to the cashier and asked her to open the till. At trial, defendant did not dispute that the incident occurred, but asserted that he lacked the capacity to form the specific intent necessary to be convicted of the crime.

Defendant first argues that he was deprived of due process when the trial court denied his request for an expert witness at public expense. Defendant asserts that the trial court's denial forced him to rely on hasty assistance arranged with the limited funds provided by his family, thus depriving him of the ability to present his diminished capacity defense. A defendant has a state and federal constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). This Court reviews constitutional issues de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

We conclude that defendant was not denied due process by the trial court's decision. Defendant's argument fails to address what we consider a significant fact: the record indicates that defendant was requesting fees to hire Dr. Aillis, the very expert that was hired with funds provided by his family. Thus, regardless of whether the expert was hired at public expense or paid for by

defendant's family, the same expert would have testified and presumably given the same testimony, as counsel never indicated that he needed more time to permit Dr. Aillis to examine defendant or to prepare a defense. Because we have concluded that defendant was not denied his due process right to present a defense, we find it unnecessary to address defendant's argument that he was denied effective assistance of counsel based on the trial court's denial of his request. However, we note the issue has no merit since defense counsel committed no error upon which a claim for ineffective assistance could be based. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Next, defendant argues that the trial court's instructions on mental illness and the guilty but mentally ill verdict were improper because defendant was not pursuing an insanity defense and that the instructions "blended" the issues of mental illness and diminished capacity, in effect negating defendant's diminished capacity defense by suggesting that the jury was required to first find that defendant was mentally ill. This Court reviews jury instructions in their entirety to determine whether there is an error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Id.* If the instructions presented the issues fairly and sufficiently protected defendant's rights, there is no error even if the instructions are imperfect. *Id.*

It is clear that where defendant offers evidence supporting an insanity defense, the trial court is required to give an instruction on guilty but mentally ill. *People v Linzey*, 112 Mich App 374, 377; 315 NW2d 550 (1981); MCL 768.29a; MSA 28.1052(1). Defendant contends, however, that because his defense was not one of insanity but one of diminished capacity, the instruction on guilty but mentally ill should not have been read to the jury. We disagree. -

Although diminished capacity is not defined in the relevant statutes, this Court has concluded that the defense of diminished capacity falls within the codified definition of insanity. *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978). Therefore, this Court determined that a defendant asserting a diminished capacity defense was required to comply with the provisions of MCL 768.20a; MSA 28.1043(1), MCL 768.29a; MSA 28.1052(1), and MCL 768.36; MSA 28.1059. *Id.* Thus, we conclude that the trial court's instructions on mental illness and the guilty but mentally ill verdict, in conjunction with its instructions on diminished capacity, did not constitute error. On the contrary, the instructions respecting mental illness and guilty but mentally ill were mandatory. *Mangiapane*, *supra* at 395; MCL 768.29a; MSA 28.1052(1). Although we note that the trial court's initial instruction to the jury may have blended the issues of mental illness and diminished capacity, the trial court clarified the issue by rereading the diminished capacity instruction and, thus, reiterated that diminished capacity was a distinct defense which required the jury to determine whether defendant had the mental ability to form the specific intent required to be convicted of armed robbery.

Finally, defendant argues that his sentence of twenty-two to forty years is disproportionate. This Court reviews a sentence imposed by the trial court for an abuse of discretion. The sentence must be proportionate to the seriousness of the crime and the defendant's background. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). This Court may not consider the

sentencing guidelines in evaluating the

proportionality of an habitual offender sentence. *People v Edgett*, 220 Mich App 686, 693-694; 560 NW2d 360 (1996). We find that defendant's sentence is proportionate to the seriousness of the offense and his criminal background, which includes several prior armed robbery convictions, as well as a substance abuse problem.

Affirmed.

/s/ William B. Murphy

/s/ Roman S. Gibbs

/s/ Hilda R. Gage