

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD RAYMOND BELL,

Defendant-Appellant.

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UNPUBLISHED

July 16, 1999

No. 194782

Calhoun Circuit Court

LC No. 95-002480 FC

ON REMAND

Before: O’Connell, P.J., and MacKenzie and Gage, JJ.

MEMORANDUM.

Defendant was charged with open murder. Following a jury trial, he 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). In an unpublished opinion per curiam issued February 13, 1998, this Court reversed and remanded for a new trial, concluding that the trial court committed error requiring reversal under *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), by instructing the jury on first-degree murder when the evidence did not support the charge. The People appealed. The Supreme Court has remanded for reconsideration of the instructional issue in light of *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), which was decided several months after our previous opinion was issued. See 459 Mich 886 (1998).

In *Graves*, *supra*, the Supreme Court overruled *Vail*, *supra*, and held that an instructional error such as the error in this case does not require automatic reversal, but instead the matter should be reviewed to determine whether the error was harmless under the “highly probable” test. *Graves*, *supra*, pp 482-483, 487-488. Under that test, reversal is not required if it is highly probable that the error did not affect the jury’s verdict. See *id.*, pp 482-483, 487. In this case, although it was error to submit the first-degree murder charge to the jury, the evidence amply supported the second-degree murder charge. The jury acquitted defendant of the unwarranted charge in favor second-degree murder. Further, we remain satisfied that the instructional error did not compromise the jury. Under these circumstances, it is highly probable that the erroneous submission of the first-degree murder charge did not affect the verdict. Accordingly, in light of *Graves*, *supra*, we now affirm defendant’s conviction of second-degree murder.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Barbara B. MacKenzie  
/s/ Hilda R. Gage