

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee/Cross- Appellant,

v

ERIK JAMES BENGSTON,

Defendant-Appellant/  
Cross-Appellee.

UNPUBLISHED

March 12, 1999

No. 202748

Midland Circuit Court

LC No. 96-007938 FC

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Before: Jansen, P.J., and Sawyer and Markman, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of assault with intent to commit great bodily harm less than the crime of murder, MCL 750.84; MSA 28.279, and entry of a building without permission, MCL 750.115; MSA 28.310. He was sentenced to four to ten years in prison on the assault conviction and to ninety days for the entry without permission conviction. Defendant appeals, the prosecutor cross appeals, and we affirm.

Defendant's only argument on appeal is that the trial court erred in refusing to allow defendant's psychiatric expert, Dr. Emanuel Tanay, to testify at trial to establish defendant's diminished capacity defense. We disagree.

This Court in *People v Mangiapane*, 85 Mich App 379; 271 NW2d 240 (1978), held that the codification of the insanity defense includes the diminished capacity defense. *Id.* at 395. Thus, to establish diminished capacity, defendant was obligated to show that he was mentally ill within the meaning of the insanity statute. *Id.* However, Dr. Tanay specifically testified at the evidentiary hearing that he did not believe defendant was mentally ill within the meaning of the insanity statute. Therefore, Dr. Tanay's testimony would not have established defendant's diminished capacity defense and, therefore, the trial court did not err in ruling that Dr. Tanay's testimony was inadmissible.

Turning to the issues raised on the prosecutor's cross appeal, the prosecutor's first issue is moot in light of our affirmance of defendant's conviction. However, the prosecutor also argues that the sentence imposed is disproportionately lenient under *People v Milbourn*, 435 Mich 630; 461 NW2d 1

(1990). We disagree. The sentence imposed was at the top end of the sentencing guidelines recommendation of twelve to forty-eight months. Sentences within guidelines are presumed proportionate. *People v Broden*, 428 Mich 343; 408 NW2d 789 (1987). We are not persuaded that the trial court erred in imposing a sentence within guidelines.<sup>1</sup>

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer

/s/ Stephen J. Markman

<sup>1</sup> We note that the sentence imposed is only one year less than the five-year minimum the prosecutor recommended at sentencing.