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UNPUBLISHED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 FC

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

GRIFFIN, J. (*dissenting*).

I respectfully dissent. The majority concludes that the trial judge abused his discretion by striking the testimony of defendant's expert witness psychiatrist Emanuel Tanay. I disagree and would affirm.

Dr. Tanay is a professional expert witness well known to this Court for testifying in favor of defendants claiming insanity. His infamous reputation for not recalling his opinions when not paid his demanded fee is documented in *People v McPeters*, 181 Mich App 145; 448 NW2d 770 (1989). His usually discredited opinions are chronicled in the following decisions: *Gacioch v Stroh Brewery Co*, 426 Mich 612; 396 NW2d 1 (1986); *People v Ramsey*, 422 Mich 500; 375 NW2d 297 (1985); *People v Murphy*, 416 Mich 453; 331 NW2d 152 (1982); *People v McLeod*, 407 Mich 632; 288 NW2d 909 (1980); *People v Cramer*, 201 Mich App 590; 507 N2d 447 (1993); *People v Canter*, 197 Mich App 550; 496 NW2d 336 (1992); *Mirza v Maccabees Life & Annuity Co*, 187 Mich App 76; 466 NW2d 340 (1991); *Davis v Lhim*, 124 Mich App 291; 335 NW2d 481 (1983); *Warfield v City of Wyandotte*, 117 Mich App 83; 323 NW2d 603 (1982); *People v Brand*, 106 Mich App 574; 308 NW2d 288 (1981); *People v Plummer*, 65 Mich App 396; 237 NW2d 482 (1975); *People v Musser*, 53 Mich App 683; 219 NW2d 781 (1974); *People v Corsa*, 50 Mich App 479; 213 NW2d 579 (1973); *People v Stoddard*, 48 Mich App 440; 210 NW2d 470 (1973); *People v Eldridge*, 17 Mich App 306; 169 NW2d 497 (1969); *People v Brocato*, 17 Mich App 277; 169 NW2d 483 (1969).

Of particular interest are *Musser*, *supra*, and *Stoddard*, *supra*. In *Stoddard*, the only expert to testify on the issue of insanity was Dr. Tanay, who testified that the "[d]efendant committed the act

while in a state of mental disorganization – a dissociative state; he acted out of an uncontrollable rage directed against his wife, but displaced without conscious control toward the victim." *Id.* at 443. Although the only rebuttal to Dr. Tanay's testimony occurred during his own cross-examination, our Court affirmed the defendant's conviction holding that the trier of fact "was not bound to accept the opinion of defendant's expert." *Id.* at 447.

In *Musser, supra*, Dr. Tanay testified that the defendant suffered from a mental disease or defect, although Dr. Tanay's report stated that the defendant did not suffer from any mental illness that would impair his ability to know the nature and quality of his acts and that his acts were wrong. In attempting to explain the discrepancy, Dr. Tanay tried to express his opinion regarding Supreme Court decisions. Ultimately, the trial judge ruled that it was the function of the court, not the expert witness, to decide the law.

In the present case, Dr. Tanay began his testimony by reciting the conclusion contained in his report that *defendant does not suffer "mental illness" as the term is statutorily defined*:

> . . . as I understand it, there is a definition of mental illness in Michigan – statutory definition – that requires for insanity defense mental illness of such intensity and proportions that it would require the presence of psychosis. And *the mental illness that she suffered, in my opinion, did not rise to the level required by, as I understand it, by Michigan law*. [Emphasis added.]

Nevertheless, Dr. Tanay opined:

> Because there was the great deal of stress, there was the state of mind that created excitement, that created – that she suffered from an adjustment disorder with depressive features, which is a psychiatric illness, which does not rise to the level that would justify insanity defense. That's why I told you there was no basis for insanity defense. But there was basis for, as I understand law, for insanity – for diminished capacity.

The Honorable James M. Batzer struck the proposed testimony of Dr. Tanay because the expert's own testimony was that defendant's alleged "adjustment disorder" did not constitute a mental illness as defined by the Mental Health Code.[1] The court ruled in pertinent part:

> *The Court:* MRE 702 provides: If the Court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> Well, certainly Dr. Tanay is an expert in psychiatry, and forensic psychiatry. The problem in this case is, and the reason the Court will strike his testimony, is that by

his own testimony, her state does not rise – and I'm quoting him almost verbatim – does not rise to the level of mental illness.

Additionally, Dr. Tanay testified that he had no opinion regarding whether defendant could have formed an intent to commit a crime as the term "intent" is defined by the law:

Q (Mr. Callanan). Was there the capacity to form specific intent that evening?

A (Dr. Tanay). No.

* * *

The Court: You're going to have to go back. You're going to have to go back. You got an answer – your question was: Was there a specific intent to do anything that evening? I don't know what you mean by that. Do you mean she couldn't intend to drive to – from Reed City to Manistee, to the apartment, she didn't intend to go to the apartment? Your question is too –

* * *

The Court: I'm saying "intent" has an everyday meaning. And that's it's meaning in law.

The Witness: That was not my understanding to this moment, Your Honor.

The Court: Well, it is. It's an everyday meaning.

The Witness: Then I have no opinion to offer then in this court, I am told; is that right?

In my view, the trial judge correctly exercised his discretion in ruling that the proposed testimony of Dr. Tanay would not be helpful because the expert's definitions of "diminished capacity" and "intent" were idiosyncratic definitions inconsistent with the law and therefore confusing to the jury. MRE 403. Contrary to Dr. Tanay's opinions, a defendant must suffer from "mental illness" or "mental retardation" for the defense of diminished capacity to be invoked. As our Court stated in *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978):

> The codified definition of legal insanity extends to persons *lacking substantial capacity* either to appreciate the wrongfulness of their conduct or to *conform their conduct to the requirements of law*, whether it results from mental illness or mental retardation. [Emphasis in original.]
>
> *We find that the defense known as diminished capacity comes within this codified definition of legal insanity.* We further find that psychiatric testimony on the

> issue of defendant's capacity to form the specific intent comes within the codified definition of legal insanity. [Emphasis added.]

See also *People v Pickens*, 446 Mich 298, 331; 521 NW2d 797 (1994), "a necessary component of the diminished capacity defense is that the defendant was mentally ill."

Further, under the 1994 amendments to the insanity statute, the insanity defense, including diminished capacity, is an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. MCL 768.21a; MSA 28.1044(1). *People v Carpenter*, unpublished opinion per curiam of the Court of Appeals, issued 7/16/99 (Docket No. 204051).

MCL 768.21a(1); MSA 28.1044(1) provides:

> It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of being mentally retarded as defined in section 500(h) of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.[2]

The majority's ultimate conclusion that "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" is contradicted by Dr. Tanay's own testimony that pursuant to the *statutory definition* of mental illness, defendant's "disassociative state" did not constitute mental illness. Under such circumstances, irrespective of Dr. Tanay's personal definition of the term, there was insufficient evidence of diminished capacity as defined by law to submit the issue to the jury. See also MRE 103(a)(2).[3] The trial judge did not abuse his discretion in so ruling.

I agree with the majority's analysis regarding the photographic evidence[4] and find no error requiring reversal regarding the form of the information, particularly in light of the adjournment granted by the trial court.

I would affirm.

/s/ Richard Allen Griffin

[1] The Mental Health Code defines "mental illness" as follows:

> "Mental illness" means a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. [MCL 330.1400(g); MSA 14.800(400)(g).]

[2] Defendant does not claim that she was mentally retarded.

[3] MRE 103(a)(2) provides:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> * * *
>
> (2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

[4] See also *People v Zeitler*, 183 Mich App 68; 454 NW2d 192 (1990).