STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN ROGERS,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 220097
Wayne Circuit Court
Criminal Division
LC No. 98-008060

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree murder, MCL 750.317, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84,[1] and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of sixteen to twenty-five years for the second-degree murder conviction, and 80 to 120 months for each of the assault convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first claims that the trial court erred in finding that the prosecutor demonstrated the requisite due diligence for admitting Deandre Knight's preliminary examination testimony under MRE 804(a)(5). We disagree. Considering the facts and circumstances presented during the evidentiary hearing on this matter, we conclude that the trial court did not abuse its discretion in ruling that Knight was unavailable for purposes of MRE 804(a)(5). *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Because defendant has not shown any basis for disturbing the trial court's decision under MRE 804(a)(5), it is not necessary to consider whether the rationale in *People v Adams*, 233 Mich App 652; 592 NW2d 794 (1999), would independently support the result reached by the trial court.

[1] Although the record clearly establishes that defendant was convicted of and sentenced for assault with intent to do great bodily harm less than murder, the judgment of sentence incorrectly indicates that defendant was convicted of assault with intent to commit murder, MCL 750.83.

Defendant next claims that the trial court's jury instructions on diminished capacity impermissibly shifted the burden of proof from the prosecutor to defendant. Recently, our Supreme Court held that diminished capacity is not a defense and that evidence of a defendant's lack of mental capacity, short of legal insanity, is not admissible to negate specific intent. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001). In any event, reviewing this issue for plain error affecting defendant's substantial rights,[2] reversal is not warranted because it does not plainly appear that the jury instructions shifted the burden of proof to defendant with regard to the elements of offenses. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

Next, defendant raises several claims in a pro se, supplemental brief. We find no error warranting relief.

Although defendant challenges the trial court's decision to admit three photographs depicting blood, the photographs have not been provided on appeal and there is some indication that the photographs might be lost. Nevertheless, we are satisfied that the discussion and descriptions of the photographs in the lower court record allow us to review this issue, *People v Wilson (On Rehearing)*, 96 Mich App 792, 796-797; 293 NW2d 710 (1980), and we find no indication that the trial court abused its discretion in admitting the photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995).

Regarding defendant's challenge to the admissibility of Officer Horan's testimony about the type of weapon that could fire the shell casings that he seized, we find no record support for defendant's claim that Officer Horan's lay opinion was elevated to expert status at trial. Officer Horan was not among the expert witnesses identified in the jury instructions, and it is plain from the trial court's evidentiary ruling that it found that Officer Horan's testimony did not amount to expert testimony. Because defendant has not briefed the question whether Officer Horan's testimony should properly be characterized as expert testimony, we deem this issue abandoned. Cf. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). Regardless, we agree with the prosecutor that any error was harmless because another expert in the identification of firearms, Officer David Pauch, also testified about the shell casings. In light of Officer Pauch's testimony, it is not more probable than not the outcome of the trial would have been different without Officer Horan's challenged testimony. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000).

It is unnecessary to address defendant's claim challenging the magistrate's bindover decision on the second-degree murder charge. In light of defendant's conviction of that offense at trial, any error was harmless. *People v Hall*, 435 Mich 599, 613; 460 NW2d 520 (1990); see also *People v Staffney*, 187 Mich App 660, 662-663; 468 NW2d 238 (1990); *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

[2] While we find some merit to the prosecutor's position that defense counsel's remarks addressing the burden of proof for diminished capacity, made while discussing jury instructions, could be viewed as affirmatively waiving any claim of error in this regard, under the circumstances, we will view the issue as one simply involving a failure to object, thereby allowing review for plain error affecting substantial rights. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Finally, we conclude that defendant has not demonstrated any actual errors that cumulatively served to deprive him of a fair trial. *People v Bahoda*, 448 Mich 261, 292; 531 NW2d 659 (1995).

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen