STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON MOURGUET,

Defendant-Appellant.

UNPUBLISHED
December 7, 2001

No. 221866
Wayne Circuit Court
Criminal Division
LC No. 98-009577

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and twenty-five to fifty years' imprisonment for each of the assault with intent to commit murder convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

The evidence at trial indicated that defendant was ejected from a birthday party at the home of Daniel Knope's parents, after he urinated on some basement steps. Defendant was pushed by Joseph Knope and Donald Lewis as he departed. Defendant returned within an hour with a semi-automatic rifle and began firing it into two rooms occupied by Daniel and Joseph Knope, Lewis, and another guest, Robert Grenke. Joseph Knope and Grenke were struck by gunfire and Joseph's wounds were fatal.

Defendant, who did not dispute that he was the shooter, presented a defense of diminished capacity based on voluntary intoxication. Defendant's expert, Dr. Abramsky, opined that defendant was not mentally ill for purposes of an insanity defense, but believed that defendant had an organic brain syndrome, which combined with drug and alcohol use, prevented him from forming a specific intent to kill. In rebuttal, the prosecutor's expert, Dr. Robinson, agreed that defendant was not mentally ill for purposes of an insanity defense, and further opined that defendant's capacity to form a specific intent to kill was not diminished.

On appeal, defendant first claims that his convictions must be reversed because the prosecutor failed to prove the requisite mens rea for his convictions beyond a reasonable doubt. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

First-degree murder requires proof that the "defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). An intent to kill may be inferred from all the facts and circumstances. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995).

Recently, in *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), our Supreme Court held that a diminished capacity defense based on a lack of mental capacity short of insanity is not a viable defense. Hence, we shall consider defendant's claim only in the context of the separate and distinct defense of voluntary intoxication. *Id*. at 239, n 10. Voluntary intoxication may be a defense to first-degree murder if the intoxication prevents the defendant from premeditating and deliberating. *People v Lavearn*, 201 Mich App 679, 684; 506 NW2d 909 (1993), rev'd on other grounds 448 Mich 207 (1995). To premeditate is to think about beforehand. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). There must be more than the amount of time necessary to form the intent to kill. *Id*. at 301. To deliberate is to measure and evaluate the major facets of a choice or problem. *Id*. at 300.

Here, defendant's conduct of acquiring a semi-automatic rifle after being ejected from the party, and then returning and repeatedly firing that rifle into the two occupied rooms, fatally wounding Joseph Knope in the kitchen and wounding Grenke in the basement, viewed most favorably to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant, with premeditation and deliberation, intended to kill Joseph at the time he fired the semi-automatic rifle. The issue of defendant's intent was properly left to the jury to resolve. See *Wolfe, supra* at 514-515.

We similarly hold that the evidence was sufficient to establish the requisite intent to kill for the three convictions of assault with intent to commit murder. See *Id*.; *Lugo*, *supra* at 709. Likewise, sufficient evidence was presented to support defendant's felony-firearm conviction. See *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000); *Wolfe*, *supra*.

Defendant next claims that misconduct by the prosecutor when questioning Dr. Robinson requires reversal. We disagree.

This issue was not preserved with an appropriate objection at trial insofar as defendant challenges the prosecutor's inquiry of Dr. Robinson with regard to her understanding of specific intent. Therefore, defendant must demonstrate a plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Because Robinson was asked to give her understanding of specific intent as a clinician, rather than provide a legal definition, we are unpersuaded that plain error has been shown. See *People v Caulley*, 197 Mich App 177, 193; 494 NW2d 853 (1992), quoting *People v Anderson*, 166 Mich App 455, 464; 421 NW2d 200 (1988). Further, even if

there was plain error, we would not reverse because defendant's substantial rights were not affected. See *Schutte*, *supra*. Defendant's own expert, Dr. Abramsky, opened the door to the challenged questions by first providing his own definition of specific intent and suggesting that he and Robinson were not operating in the same ballpark. Cf. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

Further, defendant's prosecutorial misconduct claim regarding the prosecutor eliciting testimony from Robinson about voluntary intoxication and an insanity defense was not properly preserved for appellate review. See MRE 103(a)(1); *Maleski*, *supr.a* However, even if the trial court abused its discretion by allowing the questioning to continue, reversal would not be warranted. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Not all trial errors effectively present due process errors. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). In the case at bar, regardless of whether we were to consider defendant's claim as involving a preserved constitutional due process claim or a nonconstitutional error, we would find that defendant was not prejudiced by the testimony characterizing voluntary intoxication as a separate area of the law from insanity. See *Carpenter*, *supra* at 239; *Toma*, *supra* at 296, 301. The fact that the voluntary use of drugs or alcohol may have a bearing on an insanity defense, MCL 768.21a(2); *Caulley*, *supra* at 187, n 3, does not alter our conclusion. The prosecutor's questioning of Robinson did not deprive defendant of a fair trial. See *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).

Defendant next raises three claims of error concerning the jury instructions and verdict form. Because defendant did not raise these claims at trial, they are not preserved; therefore, we review this issue for plain error affecting substantial rights. See *Carines*, *supra* at 763.

In light of our Supreme Court's decision in *Carpenter*, *supra*, defendant's reliance on the statutory scheme governing an insanity defense is misplaced as applied to diminished capacity. Defendant has not shown plain error.

With regard to defendant's claim that a limiting instruction should have been given concerning his statements to Drs. Robinson and Abramsky for purposes of their evaluations, we conclude that MCL 768.20a(5) does not require a limiting instruction, but only provides that the statements are not admissible on any issue other than a defendant's mental illness or insanity at the time of the alleged offense. Thus, to preserve this issue, defendant should have requested a limiting instruction. See MRE 105. However, even if a limiting instruction should have been given sua sponte, it is not plainly apparent that defendant's Fifth Amendment right against self-incrimination, that is, a governmental compulsion to testify against himself, was violated. See *Carines*, *supra*; see, also, *People v Cheatham*, 453 Mich 1, 9; 551 NW2d 355 (1996). On the contrary, we note that defense counsel, during his closing argument, suggested that the jury consider defendant's own statements for a substantive purpose to establish defendant's drug use. He stated in part, "then you have what transpired that evening from the words of Jason Mourguet. That he was, in fact, intoxicated by alcohol. He had a 40 ouncer. That he did have two hits of acid . . . ." In light of this record, defendant has not established plain error affecting his substantial rights. See *Carines*, *supra*.

Finally, we have considered defendant's unpreserved claim of prosecutorial misconduct grounded on the prosecutor's closing argument remark that, "based on what you've heard from Dr. Abramsky and from Mr. Mourguet's mother, in this case, it makes perfect sense because you

had a person who was a problem to begin with." Considered in context, this isolated remark is not plainly improper. See *Id*.; *Schutte*, *supra* at 720; see, also, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Cramer*, 97 Mich App 148, 161; 293 NW2d 744 (1980). Unlike *People v Fredericks*, 125 Mich App 114, 118; 335 NW2d 919 (1983), there was testimony here concerning defendant's prior conduct.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen