STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN D. HARRIS,

Defendant-Appellant.

UNPUBLISHED
July 28, 1998

No. 199249
Recorder's Court
LC No. 96-000998

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Defendant Shawn D. Harris appeals as of right from his convictions and sentences for first-degree murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Following a jury trial, the court below sentenced defendant to prison terms of life for each of the murder convictions, and two years for each of the felony-firearm convictions, the four sentences to run consecutively. We affirm the convictions, but remand for amendment of the judgment of sentence to provide for the concurrent running of the two sentences for felony-firearm, to be followed in turn by the concurrent running of the two sentences for murder.

Police and firefighters discovered the burned body Tammy Dzurisin in the trunk of her car shortly before midnight on August 18, 1995, near the intersection of Bagley and Wabash in Detroit. Expert testimony indicated that Dzurisin had been shot in the head, but then died from the inhalation of smoke and soot.

The following day, police found Stacey LeClaire, suffering from a bullet wound to the neck but still alive, in a field a short distance from where the Dzurisin's car had been found. Police testified that LeClaire managed to say that "Shawn" had shot her. LeClaire later died from her injuries.

At trial, the prosecution presented evidence that defendant and Dzurisin were involved in a romantic relationship. Two days after the relationship ended, defendant drove Dzurisin and LeClaire to a secluded area, shot both women, placed Dzurisin in the trunk of the car, poured gasoline over her, and set her and the car ablaze. The defense maintained that defendant was innocent of the crimes, that

the police had coerced defendant into signing a fabricated confession, and, alternatively, that defendant acted without satisfying the premeditation requirement for first-degree murder. The jury found defendant guilty of first-degree murder in the death of Dzurisin, and of second-degree murder in the death of LeClaire.

Defendant's first argument on appeal is that his statement to the police was involuntary and that the trial court therefore erred in refusing to suppress it. We disagree. The voluntariness of a confession is a question for the trial court. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). On appeal, we review the entire record and make an independent determination regarding voluntariness. *People v Johnson*, 202 Mich App 281, 287; 508 NW2d 509 (1993). Nonetheless, in deference to the trial court's superior ability to view the evidence and witnesses, we will not disturb the court's determination unless it is clearly erroneous. *Id.* at 288. The prosecution has the burden of proving by a preponderance of the evidence that the statement was voluntary. *Etheridge*, *supra* at 57.

Defendant testified at his *Walker*[1] hearing that the police threatened his family's businesses and refused to allow him to contact his lawyer. However, the police officer whom defendant implicated in those allegations denied both. The trial court obviously credited the police witness' testimony and discredited defendant's. We have no basis on which to second-guess the trial court's assessment of the credibility of those witnesses, and so accept the court's determination. *Etheridge*, *supra* at 57. Further, defendant testified that he was permitted to telephone his mother and grandfather before providing his incriminating statement to police. We agree with the trial court that defendant could have attempted to contact an attorney when he was permitted to call his mother. Defendant's failure to do so contradicts his claim that police had refused to allow him to call his lawyer. Further, the trial court concluded that defendant presented himself as one who would not "knuckle under" to the kind of coercion of which defendant now complains. Again, we defer to the trial court's superior ability to assess the demeanor of a witness. *Id.* That police permitted defendant access to a telephone before making the confession he now claims was involuntary suggests that defendant was free to use that opportunity to attempt to contact his lawyer, and thus that his confession was not tainted by improper denial of access to counsel.

Defendant further testified that a police officer suggested to him that if he were cooperative he might be convicted of the lesser crime of manslaughter. This testimony was not specifically contradicted. However, evidence that defendant's confession was well in progress before there was any suggestion of possible leniency, plus defendant's own testimony indicating that his statement was prompted not by a promise of leniency but for other reasons, indicates that the alleged talk of leniency did not induce the confession, and thus does not bear on the question of the voluntariness of that confession. See *People v Conte*, 421 Mich 704, 741-746 (Williams, C.J., joined by Kavanagh and Levin, JJ.); 365 NW2d 648 (1984). For these reasons, we conclude that defendant's inculpatory statement was voluntary, and properly admitted at trial.

Defendant's second argument on appeal is that the trial court erred in denying his motion for directed verdict on the ground that there was insufficient evidence of premeditation and deliberation to support a first-degree murder conviction. We disagree. When considering a motion for a directed verdict, a court must consider the prosecution's evidence presented up to the time the motion was made

in the light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the offense were proved beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

"In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id*. The defendant's actions before and after the killing, as well as the relationships existing between the persons involved, are also considerations in determining whether premeditation has been established. *Id*. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*.

Here, there was evidence from which the jury could have inferred that defendant drove the two victims to a desolate area, and brought his own weapon intending to kill them. Defendant's mother testified that she thought she saw defendant driving away in Dzurisin's car on the evening of August 18, 1995. There is no dispute that the killings occurred while the vehicle was parked in a deserted lot not visible from the street. Defendant admitted that he had owned a gun of the type involved in the murders; although he stated that he had disposed of the gun by that time, and that he shot the victims with a gun that one of them happened to have, other evidence indicates that neither victim owned a gun. Further, evidence that defendant and Dzurisin had just ended a romantic relationship, plus defendant's statement that Dzurisin had accused defendant of dating LeClaire and giving her herpes, could reasonably have convinced the jury that such intrigues provided defendant with a motive to take extreme and violent action against both women.

Additionally, defendant stated that after he shot the victims, he placed Dzurisin in the trunk of the car and poured gasoline over her and set the car on fire. This course of action suggests that defendant was acting deliberately rather than spontaneously. Underscoring that interpretation of events is the discovery of a spent bullet casing in the trunk with the victim, from which the jury may have reasonably inferred that defendant in fact forced Dzurisin into the trunk, then shot her.

In sum, the jury had abundant evidence from which to conclude that defendant persisted in a course of homicidal conduct despite having had an opportunity to take a second look. We therefore conclude that the trial court correctly found that there was sufficient evidence of premeditation and deliberation to support a first-degree murder conviction, and thus properly denied defendant's motion for a directed verdict.

Defendant's third argument on appeal is that the trial court erred in deciding not to instruct the jury regarding voluntary manslaughter, and in refusing to permit defense counsel to present that theory in closing arguments. We disagree. On appeal, jury instructions are reviewed in their entirety to determine whether error requiring reversal occurred. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Instructions must include all elements of the offenses charged, and must not exclude material issues, defenses, or theories if there is evidence to support them. *Id*. Even if the instructions are imperfect, reversal is not required if the instructions fairly presented the issues to be tried and adequately protected the defendant's rights. *Id*.

Voluntary manslaughter is a cognate lesser included offense of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). A trial court is required to instruct on a cognate lesser offense where there is evidence to support such an instruction. *Id.* at 387. However, failure to instruct on a cognate lesser offense requires reversal only where there was sufficient evidence to support a conviction of the lesser offense. *Id*.

To establish voluntary manslaughter, it must be shown that the defendant killed in the heat of passion, that the passion resulted from adequate provocation, and that there was no lapse of time during which a reasonable person could have regained emotional control. *Id.* at 388. The provocation necessary to mitigate a homicide from murder to manslaughter is that which would cause a reasonable person to lose control and act out of passion rather than reason. *Id*. at 389. "Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter. The law cannot countenance the loss of self-control; rather, it must encourage people to control their passions." *Id.* (footnote omitted).

Here, the evidence of record does not support a finding of provocation adequate to render the homicides voluntary manslaughter. According to defendant's statement, he was arguing with the victims in the car and was involved in a "shoving situation" with one of them when he saw a gun on the seat between Dzurisin's legs. Defendant stated that he grabbed the gun and shot the victims. According to defendant's own account, neither victim pointed the gun at him nor otherwise threatened him with it. Further, there is no evidence that defendant was injured from, or seriously endangered by, the so-called "shoving situation." Additionally, the evidence indicates that defendant and the victims were engaged in "swearing" and such banter, which rarely if ever constitutes adequate provocation for voluntary manslaughter, not that the victims provoked defendant with words of an informational character of the sort that may in some cases constitute adequate provocation. See *id.* at 391. Because there was no evidence of the kind of provocation which would cause a reasonable person to lose all control of the reasoning faculty, the trial court properly declined to instruct the jury regarding voluntary manslaughter.

Moreover, because there was no evidence to support a voluntary manslaughter instruction, the trial court did not err in refusing to permit defense counsel to argue that theory to the jury. It is the trial court's duty to limit counsel's argument to relevant and material matters. MCL 768.29; MSA 28.1052.

Defendant's final argument on appeal is that the trial court erred in ordering defendant to serve all four of his sentences consecutively. We agree. Although defendant failed to raise this issue below, we may nonetheless consider it because the question is one of law and the record is factually sufficient for its resolution. *People v Brown*, 220 Mich App 680, 681; 560 NW2d 80 (1996). We review questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Concurrent sentencing is the norm. *Brown*, *supra* at 682. Consecutive sentences may be imposed only when specifically authorized by statute, such as for felony-firearm and the underlying felony. *Id*. at 681-682. However, multiple felony-firearm sentences are not to be served consecutively to each other. *People v Sawyer*, 410 Mich 531, 535; 302 NW2d 534 (1981). Likewise, the homicide statute does not authorize consecutive sentences for first- and second-degree murder. MCL 750.316 and 317; MSA 28.548 and 549. Thus the trial court below had no authority to order

defendant to serve either the two felony-firearm sentences, or the two murder sentences, consecutively. We accordingly instruct the trial court to enter an amended judgment of sentence that provides for the concurrent serving of the two felony-firearm sentences, followed by the concurrent serving of the two murder sentences. MCR 7.216(A)(1) and (7).

Convictions are affirmed. Remand for amendment of the judgment of sentence. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert P. Young, Jr.

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).